The Likely Effect of the Jackson Reforms on Insolvency Litigation – an Empirical Investigation

A report commissioned by R3 (with the support of ACCA, ICAEW, ICAS, IPA, JLT Specialty Ltd, Moon Beever and Moore Stephens LLP)

By Professor Peter Walton
University of Wolverhampton

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About the Author: Professor Peter Walton

Professor Walton has taught at the University of Wolverhampton for over twenty years. He is a Professor of Insolvency Law and for many years was the Course Director of the Legal Practice Course. He is currently the Co-Director of the University's Law Research Centre. He has published widely on all aspects of insolvency law and his work has been quoted by the New Zealand Law Commission, cited by the New Zealand High Court, cited in argument in the Privy Council and been relied upon by the UK Supreme Court. He co-authors, with Professor Andrew Keay of Leeds University, a well-received textbook entitled Insolvency Law: Corporate and Personal which went into its third edition in 2012.

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This report would not have been possible without the support and guidance of:

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Glossary of Terms

Jackson Reforms:

reforms recommended by Lord Justice Jackson in his Review of Civil Litigation Costs and brought into effect by the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

Insolvency Litigation:

actions brought by liquidators, administrators and trustees in bankruptcy.

Conditional Fee Arrangements (CFAs):

agreements between a lawyer and client where the lawyer receives payment of his or her own fees only if the action is successful. The agreement will usually also provide for the lawyer to benefit from a percentage uplift when the case is won limited to 100% of base fees and subject to assessment by the court at the request of the paying party.

After the Event (ATE) Insurance:

an insurance policy which covers one party against the risk of having to pay the opposing party's legal costs in the event that the action fails.

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- The value of insolvency litigation in England and Wales is two-fold:
  - Financial: Creditors of an insolvent estate benefit from the use of insolvency litigation to recover debts owed; and
  - Public interest: Insolvency litigation provides a wider benefit to society by deterring and punishing culpable behaviour by directors.
- Conditional Fee Arrangements ("CFAs") and After-The-Event ("ATE") Insurance are used by a large majority of the insolvency profession to back insolvency litigation.
- CFAs and ATE insurance play a crucial role in the insolvency regime in England and Wales, and there is a clear public interest in ensuring the insolvency regime is rigorously enforced.
- In recognition of this public interest, insolvency litigation was granted an exemption from the Jackson reforms, which is absolute in terms, even though the Government has expressed an intention to bring the exemption to an end in April 2015.
- Insolvency litigation differs from ordinary civil litigation in a number of ways that should continue to be recognised by the law. Insolvency litigation is in the public interest and claims brought are not frivolous nor do they have disproportionate costs. For example, when a public body is sued successfully public funds are reduced, yet when insolvency litigation is successful, it is often public funds that benefit, through returns from the insolvent estate to HMRC. Alternative funding, whilst available has a high acceptance threshold and a high cost.
- The main criticisms made by Lord Justice Jackson in the context of general civil litigation are not applicable to insolvency litigation. The Jackson reforms seek to tackle the legal costs which are disproportionate to the value of legal claims and 'cherry picking' of only the strongest claims by lawyers; the Jackson reforms aim to allow public interest cases to continue to be pursued.
- The recent BIS project, Transparency and Trust, is intended to increase public confidence in the regulation of business by enhancing the capacity of the system to hold errant directors to account. The abolition of the recoverability of CFA uplifts and ATE insurance premiums in insolvency litigation appears to be working at cross purposes to this stated aim.

Executive Summary continued

Key findings

- The evidence suggests that the Jackson reforms would have a negative impact upon insolvency litigation for returns to creditors (such as HMRC and businesses) and upon the public interest.
- Under the Jackson reforms, the CFA uplift and ATE insurance premium are to be paid out of any damages awarded, thereby reducing the amount returned to creditors.
- CFA-backed insolvency litigation currently enforces claims of approximately £300m per annum.
- Between £50m and £70m of this figure relates to money owed to HMRC.
- CFA-backed insolvency litigation realises an estimated figure of £150-160m per annum.
- A majority of claims realise £50,000 or less, although a substantial minority of claims recover significant sums. Practitioners believe that should the Jackson reforms be introduced to insolvency litigation, these relatively small claims are generally unlikely to be pursued.
- Under current rules, insolvency practitioners are backed by the implied threat of CFA-funded litigation, which makes settlements with culpable individuals easier to achieve (and less expensive for creditors). Under the proposed changes, claims are more likely to be 'dragged out', at a higher cost to creditors. Wrongdoers are more likely to 'get away with it', and further culpable behaviour will be encouraged.
- There do not appear to be any viable alternatives to the current insolvency litigation regime which are capable of achieving the same level of return to creditors and ensuring those guilty of bad behaviour continue to be brought to justice.

1 Introduction and terms of reference

In 2010 Lord Justice Jackson completed his review into civil litigation costs and funding[1] (the reforms suggested by his Lordship will be referred to simply as "Jackson" for the remainder of this report). One of Jackson's key recommendations was that changes should be made to Conditional Fee Arrangements ("CFAs") and After the Event ("ATE") insurance. Specifically, Sir Rupert Jackson recommended that CFA uplifts (or success fees) and ATE insurance premiums should no longer be recoverable from a losing defendant. Jackson also proposed that these changes should be implemented "across the board" for all types of litigation.

Along with a wider package of reforms, the Government adopted these changes as part of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 ("LASPO") which came into force in April 2013. However, despite Jackson's strong view that these changes should be implemented for all types of litigation, there were four notable exemptions:

- Insolvency litigation has been given an exemption or "carve-out" which is absolute in terms. The Government has stated an intention to bring the exemption to an end in April 2015;[2]
- Mesothelioma cases – a temporary carve-out was instituted pending the introduction of a new system of funding such cases;[3]
- Defamation cases;[4] and
- Insurance premiums in respect of expert reports in clinical negligence claims.[5]

The principles which underpinned the Jackson reforms were based on the Government's concern that the civil litigation costs system had tipped the balance in favour of the claimant. The Government's concerns are clearly articulated in the Ministry of Justice's Impact Assessment "Conditional Fee Agreements."[6] The view was:

1 *Review of Civil Litigation Costs: Final Report* TSO (December 2009) (see also the *Review of Civil Litigation Costs: Preliminary Report Volumes One and Two* TSO (May 2009) ("the Preliminary Report") and the Government's subsequent consultation *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations* (Cm 7947, November 2010) (hereafter "the Consultation") and its response to the results of that consultation *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations - The Government Response* (Cm 8041, March 2011).

2 See SI 2013/77 and the Ministerial Statement dated 24th May 2012 where the Minister of Justice Jonathan Djanogly stated that the Jackson reforms "will not come into effect until April 2015 in respect of insolvency proceedings". Interestingly, the wording of the "carve-out" is limited to actions *being brought* by liquidators, administrators and trustees in bankruptcy. It does not appear to cover actions being defended by those office holders (I am grateful to Howard Roberts of Prodicus Legal Solicitors and James Wood of Schofield Sweeney LLP for pointing this out). The "carve-out" also does not apply to supervisors of voluntary arrangements nor receivers. It is not identical to, but seems based upon, the wording of SI 1995/1674 which first permitted CFAs to be used in insolvency litigation.

3 See Mesothelioma Act 2014, 2014 c 1, (and s48 LASPO, the Ministerial Statement 24th May 2012 and SI 2013/77).

4 See SI 2013/77.

5 This permanent carve-out is provided by s46 LASPO.

6 Dated 15th November 2010 which can be found at: http://webarchive.nationalarchives.gov.uk/20111121205348/http://www.justice.gov.uk/downloads/consultations/ia-conditional-fee-agreements.pdf.

1) that the system had led to spiralling and disproportionate costs where the claimant had no financial incentive to control costs. It had led to unnecessary and frivolous litigation;

2) the aim of the reforms was to crack down on the compensation culture and rebalance costs, whilst ensuring that necessary and reasonable claims could still be brought and access to justice remained;

3) the Government also highlighted that recoverable success fees and ATE insurance premiums impose a significant costs burden on the taxpayer, as Government bodies are frequently defendants in this type of litigation.[7] In an era of deficit reduction, the Government was keen to make cost savings where possible.

The granting of a temporary carve-out in favour of insolvency litigation, in itself, recognises the long established, unique nature of insolvency litigation. It has always been treated differently from other types of litigation. It has benefited from an exemption from the rules of maintenance and champerty since the nineteenth century, permitting insolvency practitioners ("IPs") to assign causes of action vested in insolvent estates.[8] In more recent times, when CFAs were first introduced in 1995, insolvency litigation was one of only three types of litigation which were permitted to use them.[9]

It is apparent from the evidence provided to the Jackson review, and subsequently to the Government during its Impact Assessment, that the effect of abolishing recoverability of CFA uplifts and ATE insurance premiums on insolvency litigation was not considered. There is a complete lack of data as to how CFAs currently operate in the area of insolvency litigation. No attempt to quantify the amount of money brought into insolvent estates by CFA-backed insolvency litigation has been made. There has been no attempt to consider how this might affect Government coffers. It is clear that when the NHS is sued successfully, public funds are reduced. When insolvency litigation is successful, however, it is often public sector creditors such as Her Majesty's Revenue and Customs ("HMRC") which benefit alongside private sector creditors.

The purpose of this research project ("the Project") and report ("the Report") has been to attempt to consider the nature of insolvency litigation and to discover how CFAs (and ATE insurance) operate in practice in this context. An attempt has been made to quantify the value to creditors of CFA-backed insolvency litigation. It is hoped that this goes some way to fill the gap in official data. The Report also attempts to assess the likely effect that Jackson will have on insolvency litigation if the temporary carve-out is not made permanent. Alternatives to the use of CFAs (with recoverable uplifts) and ATE insurance (with recoverable premiums) have also been considered.[10]

7 See e.g. *ibid* at paras 2.21 and 2.142 where it is suggested that the Jackson reforms would lead to a £55m saving to the NHS alone.
8 See e.g. *Seear v Lawson* (1880) 15 Ch D 426.
9 See SI 1995/1674.
10 The Report is limited to the law and practice in England and Wales. Scotland does not permit recoverability of CFA uplifts or ATE insurance premiums. Anecdotal evidence from Scottish practitioners suggests that although there is no prohibition on the use of ATE insurance in Scotland, it is not widely or commonly available, possibly due to the relative size of the marketplace. There is also a question mark as to whether the Scottish courts would regard it as sufficient Caution (the equivalent to the English and Welsh security for costs). Lack of funding options available to practitioners in Scotland appears to be a significant factor in decisions not to pursue voidable alienations (equivalent to transactions at an undervalue) and preferences.

2 Methodology

The Project's methodology may be considered as having two main components: first, the obtaining of empirical evidence by surveying the profession as a whole and considering data held by the Insolvency Service ("IS"); and secondly, interviewing and corresponding with members of the insolvency profession and other stakeholders. Anonymity has been promised to all respondents except where they have specifically agreed to be identified. A broad range of practitioners were interviewed and corresponded with, including IPs (from large, small and specialist firms), solicitors, counsel, representatives of the IS, representatives of HMRC, third party funders, ATE insurance brokers and interested trade and professional bodies. The views of such stakeholders were used to assess current practice as to how CFAs and ATE insurance are used and to ascertain what would happen to insolvency litigation if and when the Jackson reforms are introduced.[11]

In order to put the research accurately into its context, it has also been necessary to consider briefly the history of CFA-backed insolvency litigation. In order to address the concerns of Jackson and the Government, it has also been necessary to examine the nature generally of insolvency litigation.

11 I would like to express my deeply felt thanks to Victoria Jonson at R3 and the members of the 'Jackson' Research Committee for their advice and assistance throughout the Project.

3 Nature of insolvency litigation

It has been accepted for centuries that one of the main purposes of insolvency law is to ensure that, as a general rule, creditors have a right to share equally in the assets of the insolvent estate (this dates back to the ancient common law of bankruptcy as explained by Lord Mansfield in *Worsley v Demattos*[12]). Insolvency procedures such as liquidation, administration and bankruptcy are inherently collective in nature whereby a creditor gives up the right to enforce a debt individually in favour of taking part in collective proceedings. Subject to various established exceptions, all unsecured creditors should, as far as the value of the insolvent estate permits, be paid *pari passu* what they are owed.[13] If office holders were not able to bring actions, for example, to avoid preferences and transactions at an undervalue or to make directors liable for breach of duty or wrongful trading, the inherent fairness of the collective regime would be harmed. The ability to bring such actions clearly has a deterrent effect on preventing culpable behaviour and where such behaviour does occur such actions are necessary to put matters right. The various powers of office holders can therefore been seen as being exercised in the public interest.

As Robert Walker J explained in the context of considering the nature of wrongful and fraudulent trading, such actions cannot "be regarded simply as ordinary civil litigation. It is litigation which has, at least potentially, a public or penal element."[14]

The House of Lords have made similar comments upon the nature of insolvency litigation. In *Re Pantmaenog Timber Co Ltd*,[15] Lord Millett endorsed the views of the Cork Committee[16] in the following terms:

"From the earliest days of the joint stock company the liquidator has exercised functions which serve the public interest and not merely the financial interests of the creditors and contributories. The Cork Committee observed (in para 192 of its report) that: 'The law of insolvency takes the form of a compact to which there are three parties: the debtor, his creditors and society.' In consequence insolvency proceedings: 'have never been treated in English law as an exclusively private matter between the debtor and his creditors; the community itself has always been recognised as having an important interest in them' (para 1734)."[17]

It is in the public interest to ensure that culpable behaviour in the context of insolvency is investigated and the law is enforced as rigorously as is feasible.

12 (1758) 1 Burr 467, 478-480; 97 ER 407, 413-414.
13 See e.g. *Re Western Welsh International System Buildings Ltd* (1985) 1 BCC 99,296 and *Re Lines Bros Ltd* [1983] 1 Ch 1.
14 *Re Oasis Merchandising Services Ltd* [1995] BCC 911 at 918
15 [2004] 1 AC 158.
16 *Review Committee on Insolvency Law and Practice* (1982 Cmnd. 8558).
17 [2004] 1 AC 158 at para 52. Similar comments were made by Lord Walker in the same case at paras 78-79. See also Dillon LJ in *Bishopsgate Investment Management Ltd v Maxwell* [1993] Ch 1 where his Lordship referred to the law's previous inability to deal adequately with the dishonesty or malpractice of bankrupts and directors being "a matter of public concern, and there is a public interest in putting it right."

Insolvency litigation differs from ordinary civil litigation in a number of ways. The office holder may incur personal liability for costs even though he or she has engaged in that litigation on behalf of the estate (in effect on behalf of the creditors). In the context of corporate insolvency litigation, all practitioners (and other stakeholders) who have been interviewed agreed that in recent years there has developed a widespread practice of directors leaving insolvent companies with no or virtually no assets. These companies have no assets with which to fund an investigation into directors' conduct. In addition there is no money with which to fund any litigation (nor indeed to investigate whether the directors have sufficient assets to be worth suing).

Such litigation will very often be brought by an IP without any funding. Solicitors and counsel will need to be instructed on a CFA basis (or part CFA if there are some assets in the estate). ATE insurance will often be needed as there is no money in the estate to cover possible adverse costs.

A defendant will often ask the court to dismiss proceedings on the basis that there is insufficient cover for adverse costs (under CPR rule 25.13) if no ATE insurance is in place.

A further point to consider is that where the estate is impecunious, the IP, solicitors, counsel and ATE insurers will only get paid if the action is successful. The evidence considered below supports practitioners' views that they often run up hundreds of thousands of pounds of work-in-progress on a case. It is a risky business and as one IP who was interviewed put it, "the trick is to ensure you have more weddings than funerals."

Another matter which distinguishes insolvency litigation from the type of litigation analysed by Jackson (whose criticism centred upon personal injury litigation) is that the defendant in insolvency litigation is rarely, if ever, insured or a large public body with significant funds. Most insolvency litigation is aimed at individuals who often have only limited funds. The consequence of this is that the IP needs to be careful to bring actions only where the defendant is worth "powder and shot" (as another interviewee put it). A successful action is worthless if the defendant cannot pay.

The type of litigation which Jackson was most scathing about was where solicitors were able to take instructions on a CFA with a high uplift, take out ATE insurance (where no premium was payable if the case was lost) and if successful, claim more in legal costs than the amount of damages awarded to the claimant. This was made relatively straightforward where the defendants were insured or were large public bodies. The return for the lawyers and the insurers was guaranteed if the case was successful (either at trial or in a pre-trial settlement). The evidence considered below suggests strongly that such guaranteed uplifts for lawyers are far less common in insolvency litigation. Indeed in many cases, even where successful, lawyers and insurers write off a good deal of their fees (either because there just is not enough in the estate for full payment or because the team ethos of such litigation encourages the IP, the legal team and the insurers to take a reduced fee in order to ensure at least some payment is made to the creditors). There is little evidence that, in insolvency litigation, lawyers' fees are disproportionate to the damages. If an IP does not keep some control over the legal fees, the consequence may well be that in addition to there being no money to pay creditors a dividend, there will be insufficient to pay the IP's remuneration and disbursements. The evidence considered below contains several examples where both the IP and the legal team have written off large amounts of work-in-progress and indeed some cases where neither has been paid at all and the IP has paid for disbursements out of his or her own pocket.

IPs are usually officers of the Court[18] and act on behalf of creditors, not for themselves. The very nature of being an officer of the Court prevents IPs from taking unfair advantage of creditors or other parties, for example, by racking up unwarranted fees. In addition, IPs are supervised by their respective professional bodies. IPs are not normal litigants. Despite these restrictions being in place, IPs do not enjoy the same immunity from suit personally as that enjoyed by Official Receivers.[19] Sir Gavin Lightman has commented extra-judicially that an office holder, like any prudent business person should be "concerned, where litigation cannot reasonably be avoided, to limit his financial risk and, in particular, his risk as to costs."[20] An IP will not usually be made personally liable for costs where he or she is made a party to proceedings on the application of another party,[21] but the position is different where the IP is the claimant. In such circumstances, although the IP will usually have an indemnity from the assets of the estate (in the absence of unreasonable or improper conduct on the part of the IP), if these prove insufficient, the IP is not immune from paying those costs personally.[22] This is of particular concern to IPs where, as appears to be the case increasingly frequently, the estate has no or few funds. A lack of funds is most likely where there has been fraud or wrongdoing by the directors or connected parties.

18 See e.g. *Re Regent Finance & Guarantee Corpn Ltd* [1930] WN 84, *Appleyard Ltd v Ritecrown* Ltd [2009] BPIR 235 and Sch B1, para 5 of the Insolvency Act 1986. As officers of the Court, IPs must act honourably and fairly under the Rule in *Ex parte James* (1874) 9 Ch App 609.

19 See e.g. *Mond v Hyde* [1999] QB 1097 and also *A&J Fabrications Limited v Grant Thornton* [1998] 2 BCLC 227 where the court refused to strike out a claim in negligence against a liquidator who had failed to institute proceedings with the result that the claim became statute barred.

20 "Office holders' charges - cost control and transparency" (1998) 11 *Insolvency Intelligence* 1 at 3.

21 See e.g. *Re London Metallurgical Company* [1895] 1 Ch 758.

22 See e.g. "Liability of Insolvency Practitioners for the Legal Costs of Litigation" Chief Registrar Baister and Stephen Davies QC on Guildhall Chambers' website at http://www.guildhallchambers.co.uk/uploads/docs/section9/Insolvencypractitioners&costs_StephenBaister&StephenDaviesQC.pdf; *Re Pacific Coast Syndicate Ltd* [1913] 2 Ch 26, *Re Wilson Lovatt & Sons Ltd* [1977] 1 All ER 274, *Walker v Walker* [2006] 1 WLR 2194 and Insolvency Rules (SI1986/1925) rule 7.33 incorporating into insolvency litigation Civil Procedure Rules (SI 1998/3132) ("CPR") Part 44.

4 Brief history of CFAs and ATE insurance in insolvency litigation

Anecdotal evidence suggests that there has been an informal practice of "spec'ing" conducted by IPs and their solicitors for many decades. This is where a solicitor acts on behalf of an IP on the understanding that the solicitor will only get paid if the action is successful. The solicitor will only claim his or her regular fee. There will be no uplift.

The use of formal CFAs with an uplift was ostensibly legalised by s58 Courts and Legal Services Act 1990, but secondary legislation[23] did not bring such legalisation into force until July 1995. At this time CFAs were only possible in three types of case, namely: 1) personal injury litigation; 2) litigation before the European Commission or Court of Human Rights; and 3) litigation brought by trustees in bankruptcy, company administrators or company liquidators. The main purpose behind the introduction of CFAs appears to have been to relieve the pressure on Legal Aid and to this end, the availability of CFAs was extended to virtually all types of civil claims in 1998.[24] Concerns about the cost of ATE insurance premiums led to the Access to Justice Act 1999 introducing a new s58A Courts and Legal Services Act 1990 which entitled winning claimants to recover, in addition to any damages, the cost of the insurance premium, the base fee of the claimants' lawyers and the uplift (limited to 100% of the base fee).[25] It was this final innovation which has led to the Jackson reforms for most types of litigation. It is interesting to note that when CFAs were first introduced, insolvency litigation was recognised as special case and its unique characteristics have been recognised once again by the Government's decision to provide a two-year carve-out from LASPO.[26]

Research[27] carried out into transaction avoidance mechanisms in corporate insolvency between late 1996 and early 1997 by Professor Milman and (the then) Dr Parry, concluded, in that context, that practitioners were only "using [CFAs] in the odd case on an experimental basis". Although the Insolvency Lawyers' Association had produced a model conditional fee agreement[28] there appears to have been little initial take-up of such agreements. Two main difficulties were identified by Milman and Parry. The first was that although the solicitor could claim an uplift of up to 100% of the basic fee, this uplift was limited to no more than 25% of the eventual recovery by the client (the insolvent company).

23 Conditional Fee Agreements Order 1995, SI 1995/1674 and Conditional Fee Agreements Regulations 1995, SI 1995/1675.
24 Conditional Fee Agreements Order 1998, SI 1998/1860.
25 See Conditional Fee Agreements Regulations 2000, SI 2000/692 and Conditional Fee Agreements Order 2000, SI 2000/823
26 For a consideration of the development of CFAs in England and Wales see e.g. *Report of the Civil Justice Review Body* (Cm 394, June 1988); the Government Green Paper on *Contingency Fees* (Cm 571, January 1989); the Government White Paper *Legal Services: A Framework for the Future* (Cm 740, July 1989); the Government Consultation Paper *Access to Justice with Conditional Fees* (1998); Walters and Peysner "Event Triggered Financing of Civil Claims: Lawyers, Insurers and the Common Law" (1999) 8 *Nottingham Law Journal* 1 and Zander "Will the Revolution in the Funding of Civil Litigation in England eventually lead to Contingency Fees?" (2002) 52 *DePaul Law Review* 259. There has been a great deal of case law over the past 25 years or so considering the detailed requirements of CFA agreements. Much of the law and practice relating to CFAs have now been clarified. The 2000 CFA Order has now been repealed and replaced by the Conditional Fee Agreements Order 2013, SI 2013/689.
27 Milman and Parry *A Study of the Operation of Transactional Avoidance Mechanisms in Corporate Insolvency Practice* ILA Research Report July 1997.
28 See (1996) 12 *Insolvency Lawyer* 28 and (1996) 12 *Insolvency Law and Practice* 163. The Law Society also produced its own precedent designed primarily for personal injury cases. The CFA agreements which are used by solicitors in insolvency litigation today tend to be a firm's own updated version of the Insolvency Lawyers' Association precedent.

The second problem identified was in relation to potential adverse costs if the action failed. Milman and Parry explain that such costs would need to be borne by the insolvent estate and although it would be possible to insure against adverse costs the problem of finding the money for the premium would still need to be resolved.

A pioneering approach to CFAs and ATE insurance can be seen in the 1996 decision of His Honour Judge Roger Cooke sitting as judge of the High Court in *Newsforce Marketing Ltd v Chander Hingorani* .[29] The plaintiff company was heavily insolvent and had entered liquidation. The effective defendants were the National Federation of Retail Newsagents, a trade organisation representing independent newsagents nationwide. The principal object of the plaintiff company had been to make a range of marketing and promotional opportunities available to the members of the Federation. The plaintiff company claimed entitlement to certain monies paid by the Federation's members, such claims being based on contractual and/or trust principles. The plaintiff company had entered into a CFA with its solicitors and counsel. Due to the action arising so soon after the introduction of CFAs to insolvency litigation, the CFA itself was a bespoke product drafted by the plaintiff's solicitor.[30] The defendants requested security for costs against the plaintiff (under what is now CPR 25.13(c)). The evidence showed that the plaintiff had some cash but not sufficient to cover an adverse costs order. ATE insurance was by no means commonly available at this time but the plaintiff's solicitors tracked down an insurer in the Isle of Man. HHJ Roger Cooke commented that it was "a good deal more likely than not, as it seems to me, [that the policy] will cover everything that the defendants could conceivably want if it works." The effect of the policy (taken together with the cash which remained in the company) was sufficient security for costs. The case was subsequently settled. It is clear that without the benefit of the CFA and the insurance against adverse costs, the claim would have struggled to get off the ground and the creditors of the company in liquidation would have lost out.

As mentioned above, changes made by the Access to Justice Act 1999 brought into force in 2000 permitted the recoverability of the CFA success fee and the ATE insurance premium from the losing party. The past decade has seen a slow increase in IPs' use of CFAs (and ATE insurance) although as will be explained below, only a relatively small minority use them frequently. Practice has further developed so that ATE insurance premiums and CFA success fees are frequently staged so as to increase at certain critical stages of the litigation. ATE insurance is often provided on such terms that the premium is only payable if the claim is successful. If the claim fails, the claimant is not liable to pay the premium. If there is money in an insolvent estate, legal costs may be partly paid with the remainder on CFA terms.

Subsequent developments in insolvency litigation practice identified by practitioners include the use of provisional liquidation and freezing or search orders backed by CFAs, in cases of taxation fraud. The Court of Appeal's decision in *Re Arena Corporation*[31] confirmed the legitimacy of this practice. In such cases, once an order putting the company into provisional liquidation is made, the solicitors for the provisional liquidator will apply for freezing orders against the assets of the defendants and serve copies of the freezing orders on relevant parties, who are frequently banks holding assets on behalf of the defendant. The costs of acquiring and serving the freezing orders falls on the solicitors, or the IP should he or she agree to indemnify, but more often this is the solicitors' part of the shared risk. They may have to pay up to £50,000 of their own money to do so, which they will only recoup if the case is ultimately successful.

29 Unreported 28th June 1996.
30 Mr Robert Brown of hlw Keeble Hawson LLP to whom the author is most grateful for supplying the background to the case and a transcript of the High Court decision. The case may well be the first ever example of CFA-backed insolvency litigation.
31 [2004] EWCA Civ 371.

HMRC is often the largest unsecured creditor in an insolvent estate. It often encourages action to be taken by an IP and will support the IP with appropriate evidence of wrongdoing (the effectiveness and efficiency of this has been questioned by some practitioners but it is clearly of assistance in many cases). Until fairly recent times, HMRC was able to provide significant financial support for actions by IPs in appropriate cases, but such funding appears now to be significantly restricted.

The evidence considered below suggests that a relatively small number of IPs and solicitors' firms do a lot of CFA-backed insolvency litigation and a significant number of others will use CFAs comparatively rarely. A number of practitioners have made the point that, often for relatively small claims, an IP and a solicitor will have an informal "spec'ing" type of arrangement in place whereby the solicitor will not expect an uplift at all and will only be paid if the case is successful. This type of arrangement is not usually fully documented with a formal CFA agreement.

Even though the four largest City IP firms have a reputation for only taking appointments where there are assets to cover their fees (and the fees of their legal team), the evidence suggests that three of the Big Four are increasingly using CFAs to conduct litigation where there is a lack of funds in the insolvent estate. These actions are typically for large sums (e.g. £1.3m and £650,000). Even though the remaining Big Four firm does not use CFAs itself, it is very supportive of their current and continued use generally.

There is also significant anecdotal evidence that claims worth "many millions of pounds" are settled every year on confidential terms where the existence of ATE insurance has encouraged a settlement sooner rather than later on terms beneficial to creditors. In such cases, there are commonly some funds in the insolvent company and so a CFA is not needed. The settlement of the claim is often reached just before the next increment on the ATE insurance premium is due. The fact that the defendant will be liable to satisfy the cost of the ATE insurance premium, in the event the matter goes to trial and the defendant loses, is often a critical inducement to settle the claim. Due to the confidential nature of such settlements, it is has not been possible to identify any data supportive of this phenomenon but it is clear that recoverability of the ATE insurance premium is a useful tool for IPs pursuing such claims.

5 The empirical evidence

Three different approaches were used to gather evidence as to how CFAs (together with ATE insurance) are currently being used in insolvency litigation.

1) A questionnaire was sent out to members of the insolvency profession in an attempt to quantify the value of CFA-backed insolvency litigation to insolvent estates. The questionnaire was designed and sent out in May 2013 to members of R3, ICAEW, ACCA, IPA and the ILA. A copy of the questionnaire may be found at Appendix 1. The questionnaire itself consisted of two halves. The first half, Part A, asked general questions of practitioners as to their annual use of CFAs and ATE insurance in insolvency litigation over a three year census period. Part B asked for details of specific cases during the census period where CFAs had been used and asked for a breakdown as to the value to the estate of the litigation, whether it settled, which creditors benefited from the litigation, the amount of lawyers' fees and success fee under the CFA and the cost of any ATE insurance.

   Despite the questionnaire being sent out several times to practitioners and the author speaking at various practitioner conferences, the results of the survey were somewhat limited. There may be a number of reasons for the poor response rate. The questionnaire itself is quite long and involved. A majority of IPs only deal with a very small number of CFA-backed cases. A combination of these factors appears to be the main reason for a limited response rate. Despite this, the results were useful in that the answers to Part A (although somewhat limited) did provide evidence of general trends and the answers to Part B provided a number of very clear and helpful individual case studies. Some of these case studies are referred to below in Part 6. Where possible, the facts and figures provided by the respondents have been verified by searches at Companies House. Where verification was possible, the information provided by respondents was found to be reliable. Any discrepancies were very minor.

   The relatively small number of clear answers to Part A made an assessment of the annual value of CFA-backed insolvency litigation difficult (18 respondents provided detailed answers to Part A whilst 24 responded that they had not used CFAs). The responses of this questionnaire were too few to permit them to be relied upon quantitatively to give an accurate picture of the incidence and value of CFA-backed insolvency litigation.

2) The second approach to gathering evidence was to use data held by the IS to whom the author is grateful for permitting access to some of the data held by it in relation to sanctions requests made to the IS. These sanctions requests are made in the context of bankruptcies and compulsory liquidations where there is respectively, no Creditors' Committee or Liquidation Committee, able to consent to the IP commencing litigation. In such circumstances, the IS acts on behalf of the Secretary of State, in deciding whether or not to sanction the commencement of the action.[32] The data held by the IS are limited to sanctions requests made in 2010 and, of course, do not contain data on litigation commenced in compulsory liquidations or bankruptcies where the creditors have sanctioned the action, creditors' voluntary liquidations or company administrations.

32 See ss 141(5), 167, 302(2) and 314 and Schedules 4 and 5 Insolvency Act 1986.

3) In order to remedy the lack of useable data from the initial questionnaire, the main questions in its Part A were replicated in the thrice yearly survey of R3 members (carried out on behalf of R3 by ComRes) in the summer of 2013. These questions are reproduced in Appendix 2. The response rate to this survey was significantly higher than to the previous questionnaire. Of the 236 respondents, 168 were appointment takers and of that number 117 had used CFAs at some time.

The findings of this Report rely principally upon the results of the summer 2013 R3 survey and the 2010 data held by the IS.

HMRC does not keep separate statistics[33] relating to money lost due to insolvency or to money gained by the action of IPs (often supported by HMRC) to recoup that money. Despite this, it has been possible to estimate the annual value of CFA-backed insolvency litigation to HMRC by analysing the empirical evidence.

A Analysis of Sanctions Requests held by the Insolvency Service for 2010 (Jan-June)

The following analysis considers all sanctions requests relating to CFA – backed insolvency litigation which were made to the IS between January and June 2010. Out of a total of 1,157 sanctions requests applications made during this 6 month period, 234 related to a request to bring litigation backed by a CFA.

Prior to considering the statistics gleaned from these data a number of points should be noted. Many sanctions request applications made during this period were merely asking for a small uplift in base legal fees or for some other amendment to a previous request. Some requests were duplicated (especially where there were co-defendants), some related to a request for approval of a compromise, some were to request permission to trade or use a bank account, some were mistakenly made for sanction in a creditors' voluntary liquidation (sanction from the Secretary of State is only possible in compulsory liquidations) and some related to other miscellaneous correspondence. Many suggested that a form of informal CFA without uplift was being adopted but these have not been included in this analysis. Overall, it is estimated that about a quarter of all the substantive applications, involved requests for sanctions to bring CFA- backed litigation.

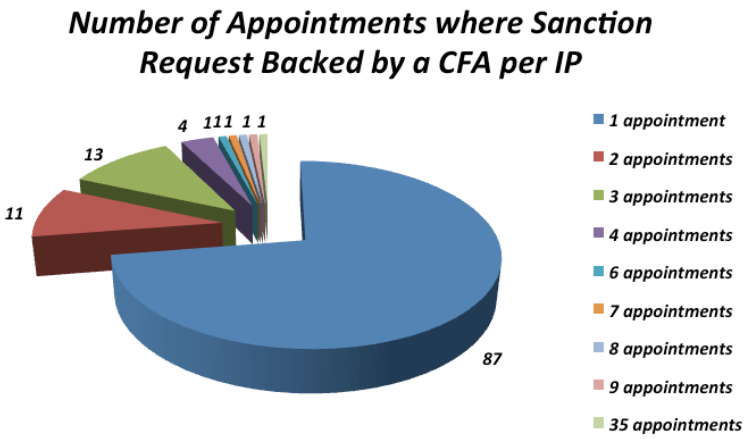
The total number of sanctions requests made in the second half of 2010 (for the period July – December 2010) was slightly less than the first half of the year (1,048). No complete analysis of the July - December 2010 sanctions requests has been carried out.

The number of sanctions requests which relate to compulsory liquidations has been looked at across the whole of 2010. There were in total 96 such cases. A summary of each of these compulsory liquidation cases is found in Appendix 3. Out of those 96 sanctions requests, 71 of those compulsory liquidations are ongoing. Only 25 of the 96 compulsory liquidations have been completed. Some of these liquidations have continued for over 10 years. It should be noted that as a large majority of these compulsory liquidations are ongoing, the claims which are the subject of the sanction requests, are likely to be still on foot and may lead ultimately to a successful conclusion.

33 The nature and amount of data held by the Government in relation to insolvency has been described as "pretty uninformative" by Professor Sir Roy Goode in a letter from October 2010 (referred to by Dr John Tribe in his blog found at: http://bankruptcyandinsolvency.blogspot.co.uk/2010/10/professor-sir-roy-goode-qc-on.html (see also Tarling "The Absence of Insolvency Data" (2013) *Company Lawyer* 234).

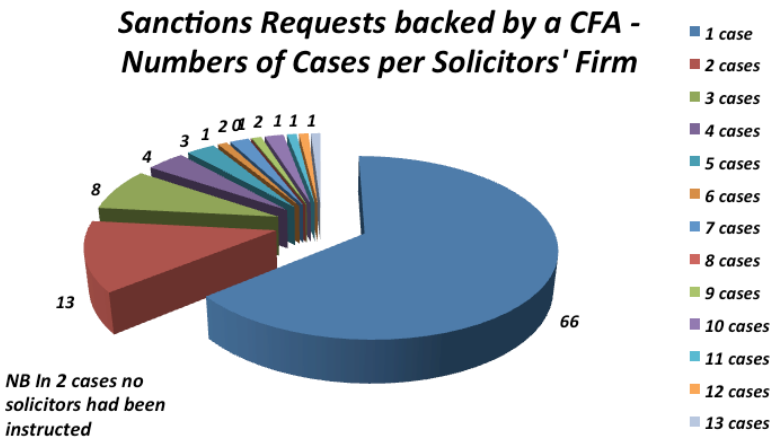
Searches at Companies House have been carried out against all 25 of the completed compulsory liquidations in an attempt to discover how successful the CFA-backed litigation was in those cases. Unfortunately, the information held by Companies House is inconsistent. On completion of a compulsory liquidation, all liquidators file a Form S172(8) explaining that a final meeting of creditors has been called under s146, but a few, and only a few, also file a Payments and Receipts Account ("the Account") too. The requirement to file the Account appears in Regulation 14 of the Insolvency Regulations.[34] The practice of Companies House has been not to require such an Account to be filed and have in more recent times refused to accept such Accounts even where the IP has attempted to file one. The consequence of the lack of consistent data held at Companies House in relation to these 25 completed liquidations, was that each liquidator was contacted individually with a request for a copy of the respective Account (where one had not been filed). I am most grateful to those liquidators who kindly provided such Accounts. Results of the CFA-backed litigation have now been identified in 14 of the 25 cases where the liquidation has been completed and the results of these 14 compulsory liquidations are referred to as appropriate as part of the following analysis.

The following graphs relate to sanctions requests made in both bankruptcies and compulsory liquidations for the period January – June 2010. Where appropriate the accompanying analysis considers how the statistics might be extrapolated to give a likely annual figure. Each graph has its own heading and is followed by a brief analysis of its results.



These figures are consistent with the view of all those stakeholders interviewed to the effect that there is a relatively small number of IPs who do a lot of CFA-backed litigation with a large number who do the occasional case. The figures show that 87 IPs had only one such case during this six month period whilst 11 had two cases and 13 had three. A handful of IPs had 6 or more such cases. One IP had 35 cases (all 35 were bankruptcy possession and sale cases).

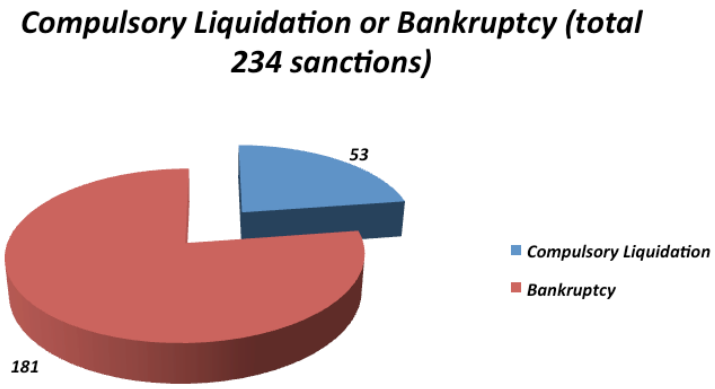
34 Insolvency Regulations 1994 (1994/2507).



Again, many stakeholders expressed the view that a relatively small number of solicitors' firms specialised in CFA-backed insolvency litigation. The spread is a little wider than for the IP graph above but shows that only a handful of solicitors' firms had 10 or more cases during the first six months of 2010.

This graph and the previous one go some way to support the view that a relatively small number of IPs and solicitors specialise in this type of work. It is clear from interviewing practitioners that specialist IPs and solicitors work closely as a team (often with ATE insurers) on these cases. There are still a lot of CFA-backed cases brought occasionally by IPs and solicitors who do not base their practice around such cases.

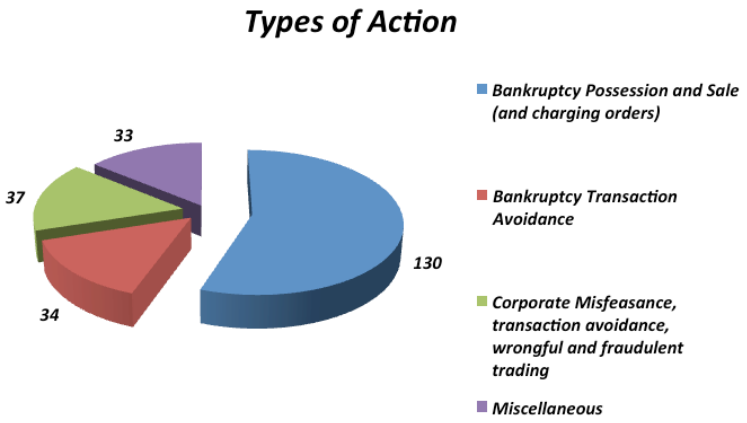
One point made by a number of interviewees is that most firms who do not specialise in this type of work (whether IPs or solicitors) are not set up to take on a lot of CFA cases as they would be unwilling or unable to risk not being paid for what can be very large amounts of work-in-progress. Such risk is being taken on behalf of the insolvent estate and its creditors.



The total number of sanctions requests in this six month period involving CFA-backed litigation was 234. Of this figure, 53, or 23% of the total, involve companies. A further 43 corporate sanctions requests were made in the second six months of 2010 giving a total of 96. For the first six months

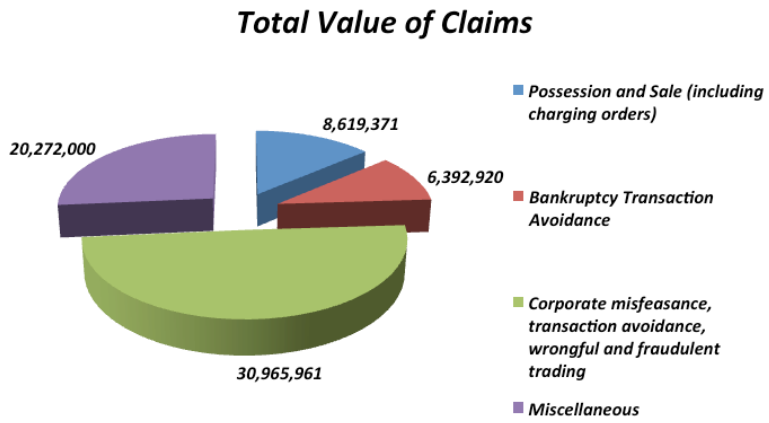
of 2010 there were 181 cases in bankruptcy estates. As mentioned above, the total number of sanctions requests made in the second six months of 2010 was 1,048 (as opposed to 1,157 in the first six months). In the first six months, approximately 20% of all sanctions requests recorded were for new substantive sanctions involving CFA-backed litigation. If the same proportion is taken for the second six months the total figure for sanctions requests involving CFA-backed litigation for the second six months would be 210, of which 43 were corporate sanctions leaving an estimated 167 bankruptcy cases.

This would give a likely total of CFA-backed sanctions requests for 2010 of 444, of which 348 would be bankruptcy cases and 96 company cases.



The majority of sanctions requests made in the first six months of 2010 relates to possession and sale actions in bankruptcy. Many of these cases are relatively straightforward with a high chance of success. A large minority of cases involve transaction avoidance in both bankruptcy and liquidation.

The transaction avoidance cases in liquidation are often linked to misfeasance proceedings under s212 Insolvency Act 1986 (references hereafter to section numbers or schedules are to this Act unless stated otherwise), fraudulent trading under s213 and/or wrongful trading actions under s214 and so have been grouped together for the purposes of the analysis. The Miscellaneous category included both bankruptcy and liquidation claims as diverse as the recovery of illegal dividends, the recovery of overdrawn directors' loan accounts, actions for breach of contract and even one personal injury action.



Perhaps not surprisingly the biggest value claims occur in the corporate actions. The total value of claims for the first six months of 2010 is £66,250,252. The mean average claim for this period is £283,120. This average is skewed a little by a small number of very high claims. If the single large corporate misfeasance claim for £15m and the single large Miscellaneous bankruptcy claim of £12m are discounted the average of the remaining claims is £169,182.

Of the Miscellaneous cases the value of liquidation cases is £4,693,000. This provides a total value for all company cases for this six month period of £35,658,961. The total of corporate claims for the second six months of 2010 is £25,346,826 which provides an annual total of company claims where sanction has been requested of £61,005,787 for 2010.

These figures relate only to CFA-backed litigation in compulsory liquidations where sanction for the action has been requested from the IS. It takes no account of compulsory liquidations where sanction has been given by the Liquidation Committee. Cases where the sanction of the Liquidation Committee is sought are likely to involve significant sums (see, for example, the claim which settled for £500,000 in Case Study B and the ongoing claim for £650,000 in Case Study D in Part 6 *Selected Case Studies provided in response to the initial questionnaire below*).

Figures available on the IS website[35] state that for 2010 there were 4,793 compulsory liquidations compared with 11,253 creditors' voluntary liquidations ("CVLs") which gives a ratio of approximately 1:2.35. If the claims in the sanctions requests are typical of insolvency claims in liquidations generally,[36] one can extrapolate from the figures for CFA-backed litigation in compulsory liquidation, where sanction has been requested from the IS, by multiplying that annual figure for 2010 (£61,005,787) by 2.35[37] which gives a figure of £143,363,590 for CVLs. This suggests an annual figure of claims in liquidations in excess of 200m (£204,369,377) which are supported by CFAs.

35 http://www.insolvencydirect.bis.gov.uk/otherinformation/statistics/201102/index.htm

36 For an example of a CFA-backed claim in a CVL which settled for a global figure of £180,000, see Case Study C in Part 6 *Selected Case Studies provided in response to the initial questionnaire* below.

37 It is, of course perfectly possible that there are fewer CFA-backed actions brought by liquidators in CVLs *pro rata* than in compulsory liquidations. The responses received from the small sample of 18 who responded to the first survey would suggest CFA-backed litigation is more common *pro rata* in compulsory liquidations than in compulsory liquidations. The sample number is realistically too small to place any great reliance upon.

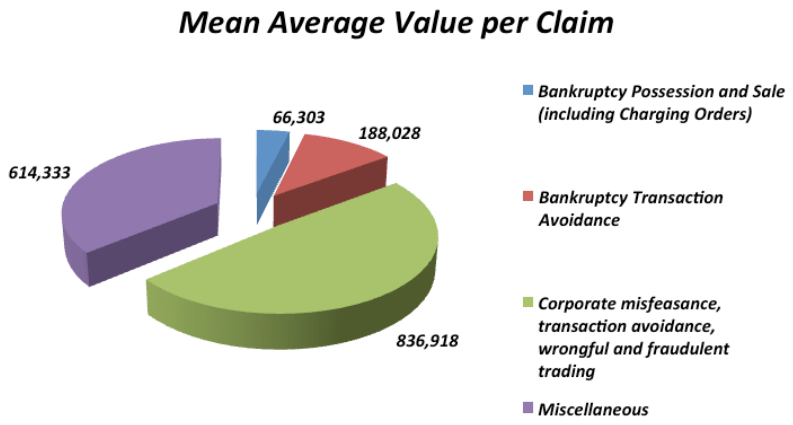
This takes no account of CFA-backed litigation in compulsory liquidations where the sanction of the Liquidation Committee has been sought nor to CFA-backed litigation where companies are in administration (there were 2,835 administrations in 2010).

Although HMRC keeps no record of how much money it is owed from insolvent estates, the Office of Fair Trading estimates that 24%[38] of all unsecured debt in liquidations is owed to HMRC. From this estimate it is reasonable to suggest that 24% of the money being claimed by IPs in liquidations by CFA-backed litigation is likely to be owed to HMRC. This would suggest that, of the likely annual total figure for CFA-backed litigation in liquidations, approximately £50m (£49,048,560) would be payable to HMRC. This estimate does not take account of money owed to HMRC in bankruptcies, in compulsory liquidations where the Liquidation Committee has sanctioned the action nor in corporate administrations.

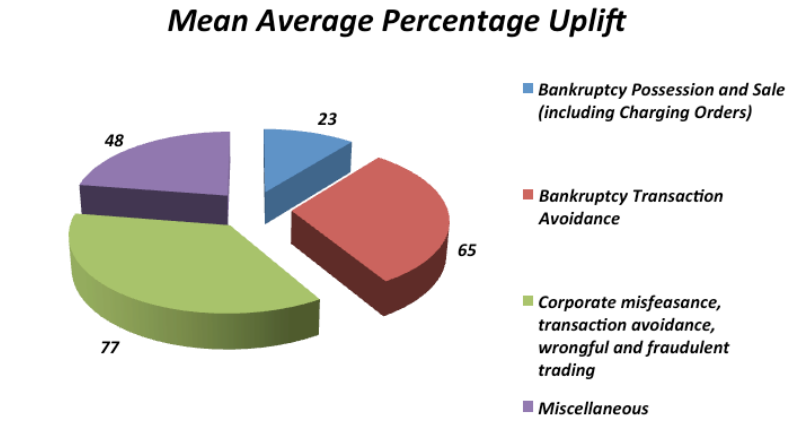
The total value of the sanctions requests made in relation to bankruptcy CFA-backed litigation for 2010 is £30,591,291 for the first six months (from a total of 181 cases). Extrapolating proportionately for the remainder of the year, one might estimate that there would be approximately 167 bankruptcy CFA-backed sanctions requests for the second six months of 2010. This would suggest an annual figure for claims in CFA-backed litigation in bankruptcies of £58,816,403. Although there is no central record of how much money is owed to HMRC in bankruptcies, when one considers the size of some business related bankruptcies the proportion of this figure which is owed to HMRC is likely to be significant.

With an uncertain figure for CFA-backed litigation in company administrations (and compulsory liquidations and bankruptcies where the Liquidation Committee or Creditors' Committee respectively have sanctioned the action), the final annual figure for claims made in all CFA-backed insolvency litigation for 2010 is likely to be in the region of at least £300m per annum (£204,369,377 for liquidations plus £58,816,403 for bankruptcies plus an unknown figure for CFA-backed litigation in company administrations and other compulsory liquidations and bankruptcies, which anecdotal evidence suggests would be at least £35,000,000). Of this likely total, between £50m and £70m is likely to represent money owed to HMRC.

38 "The market for corporate insolvency practitioners: a market study" OFT1245 at footnote 6.



It is clear that although claims in bankruptcy are more numerous than in compulsory liquidation, the average value of each claim is significantly greater in the corporate actions. The most frequent claim, as highlighted above, is for possession and sale of property owned by a bankrupt but the average value of such claims is the lowest. If one ignores the two standout large claims, £15m in the Corporate Misfeasance and Transaction Avoidance category and £12m in the Miscellaneous category, the average claims in those categories would still be £443,499 and £258,531 respectively.



Although there are some complex, or otherwise difficult, possession and sale cases, most are likely to be reasonably straightforward and so one would expect a relatively low average percentage uplift. The data suggests an average uplift in such cases of 23%. Transaction avoidance cases are likely to be more complex and take longer to settle or come to trial. The risks to a legal team are likely therefore to be higher. The average uplift for such claims is therefore likely to be and in fact is higher (in bankruptcy cases 65% and in corporate cases 77%).

One issue highlighted by Jackson was the view that the level of uplifts in CFAs caused legal costs to be disproportionately high in relation to the value of the claim. Jackson proposed a definition of what is proportionate in the following terms:

"Costs are proportionate if, and only if, the costs incurred bear a reasonable relationship to:

(a) the sums in issue in the proceedings;

(b) the value of any non-monetary relief in issue in the proceedings;

(c) the complexity of the litigation;

(d) any additional work generated by the conduct of the paying party; and

(e) any wider factors involved in the proceedings, such as reputation or public importance."[39]

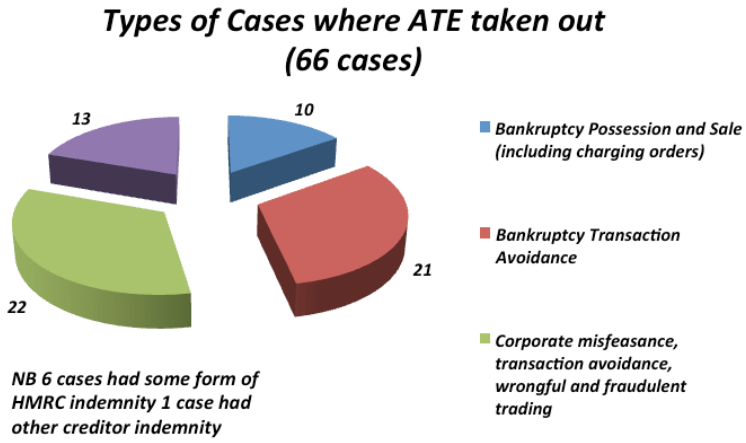
The evidence relied upon by Jackson gave as examples, cases where the damages awarded were less than the overall legal bill.[40] There is very little, if any, evidence that this type of case exists at all in insolvency litigation. The 96 corporate cases from 2010 detailed in Appendix 3, suggest that it is extremely rare to have a case where the prospective legal costs of litigation outweigh the value of the claim (it would seem case number 57 out of 96 may be one such case but it is exceptional). Insolvency litigation is often quite complex and often defendants are relatively sophisticated who engage in spoiling or delaying tactics. In addition, for reasons discussed above, most, if not all types of insolvency litigation may be seen as of public importance. It would seem that Jackson's concerns around proportionate costs do not obviously apply to insolvency litigation.

Even though there is little evidence of disproportionate costs in insolvency litigation, some consistency could usefully be introduced. The 96 corporate cases and the bankruptcy case sanctions requests for the first six months of 2010 suggest a possible inconsistency of approach across the profession. One would expect similar claims to demand a similar uplift. Some types of claim, for example, possession and sale cases, where no obvious complexities have been identified, and the chances of success are given as "good" or "likely" show a variation of uplift from nil to 100%.

The function of the IS in agreeing sanctions requests is to act in place of a committee of creditors. The data held by the IS suggests that the IS is keen to ensure that the base legal cost of CFA-backed litigation is reasonable. Indeed many applications to the IS involve asking sanction for a small increase in such base costs. There appears to be little, if any, querying of the level of CFA uplift. Two observations may be made about this practice. First, under the current regime, it is difficult to see why the IS, in acting in the role of a creditors' committee, would be at all worried about either the level of the base fee or the level of uplift. Under the current regime, both are recoverable from a losing defendant in addition to any damages. The benefit to the estate is in theory untouched by either the base legal costs or the level of uplift. If the IS, in agreeing sanctions requests, is taking account of the complex nature of some global settlement agreements, it ought to be just as concerned with percentage uplifts as with base legal costs. Secondly, if and when the insolvency carve-out from Jackson comes to an end, the IS will need to consider changing its approach to sanctions requests. It will need to consider both the base legal costs and the percentage uplift as both will be payable out of any ultimate recovery.

39 Para 5.15 of Jackson.
40 See e.g. para 4.5 where a supermarket had provided data showing that where damages for a personal injury claim were for between £2,000 and £3,000, the claimant's costs amounted to 160% of the damages (£3,200 – £4,800).

The level of average percentage uplift is perhaps an area which the IS is not best suited to police or lead on. There would seem to be no reason why it could not be the subject of guidance from professional regulators. It would encourage more transparent setting of uplifts, if, for example, the Joint Insolvency Committee ("JIC")[41] provided an Insolvency Guidance Paper demonstrating recommended levels of uplifts for typical cases using clear and consistent terminology in assessing likely chances of success. A number of interviewees were of the opinion that the divergence in practice in levels of uplift suggested that IPs do not always give the issue as much consideration as perhaps they might or ought. Whilst some firms of IPs and solicitors do approach this matter in a very detailed and methodical manner, a number of practitioners who deal with such cases only rarely might benefit from such guidance.



ATE insurance was only taken out in approximately 28% of the cases analysed from the first six months of 2010. Perhaps not surprisingly, IPs tend to take out ATE when the stakes are higher. Proportionately, ATE insurance is taken out more often in the context of potentially more expensive and complex transaction avoidance and associated claims (approximately 60% of cases) than in comparatively straightforward possession and sale claims (approximately 8% of cases). Practice varies considerably from IP to IP. Some IPs who do a good deal of this type of work rarely if ever take out ATE insurance. On the other hand, the data suggests that some IPs require adverse costs cover even in relatively risk-free possession and sale cases.

Jackson is critical of the cost of ATE insurance premiums[42] as an expensive form of one-way costs shifting. Jackson identifies the policy objective of recoverable ATE insurance premiums as being based upon the need for certain claimants to be protected against the risk of having to pay adverse costs. IPs would appear to fall into such a category. The pre-Jackson regime was flawed as it was not targeted upon those who merited such protection but again was open to all. Thus even wealthy claimants could take out and recover the premium for ATE insurance if successful. Jackson recommended the abolition of recoverability of ATE insurance premiums and the introduction of a system of qualified one-way costs shifting to protect certain types of claimants. Under the system of qualified one-way costs shifting, a losing claimant is only liable for

41 "The Committee comprises eight members, one representing each of the seven insolvency authorising bodies, i.e. the Recognised Professional Bodies recognised under the Insolvency Act 1986, and one representing the Insolvency Service… The Committee is responsible for the co-ordination of policy relating to the licensing of insolvency practitioners, to improve, develop and promote insolvency standards, and to facilitate discussion between the authorising bodies." Found at: http://www.icaew.com/~/media/Files/About-ICAEW/Who-we-are/ICAEW-governance/joint-insolvency-committee.pdf

42 See e.g. the Preliminary Report para 4.4.

his or her own costs (including success fee if successful) but not the other side's costs if the other side is successful (unless in all the circumstances it is reasonable so for the court to order). Losing defendants pay their own costs and the claimant's costs in the ordinary way (without being liable for any success fee or ATE insurance premium).

The problem with the possible introduction of qualified one-way costs shifting to insolvency litigation is that although in theory the claimant will not be liable for adverse costs, this will not be the case in all instances. There is a clear danger of personal liability to IPs in continuing to pursue a case after rejecting a Part 36 offer without the benefit of ATE insurance. Nick Oliver,[43] in his worked example replicated in Appendix 4, provides a third scenario based around the effect of a qualified one-way costs system. Mr Oliver makes the point that there would need to be complete certainty regarding IPs' exemption from adverse costs for the system to be relied upon by IPs. If there remained the residual danger of an adverse costs order by failing to beat a Part 36 offer, IPs would still take out ATE insurance and the considerable benefit to the estate of one-way costs shifting would be lost.[44] In such circumstances, the outcomes for the estate would be broadly in line with Mr Oliver's Scenario 2 (as summarised below), where there is no recoverability of CFA success fees or ATE insurance premiums.

The consensus view of stakeholders, including IPs, solicitors and insurers who were interviewed as part of this Project, was that, even if a system of one-way costs shifting were to be introduced, IPs would be likely to continue to require the benefit of ATE insurance wherever they currently take it out. There would be little reason for an IP who is bringing an action on behalf of others, not to protect himself or herself from potential adverse costs.

One point made by one of the main ATE providers was that there were thought to be about 300 to 400 CFA-backed insolvency cases brought a year with the benefit of ATE insurance. There are thought to be only 5 or 6 insurers who cover a reasonable amount of insolvency litigation. One of the concerns of the insurers was that should Jackson apply to insolvency litigation, fewer CFA-backed cases would be brought and therefore fewer ATE insurance policies would be taken out. The consequence of this was seen as likely to lead to fewer insurance products being available with fewer insurers remaining in the market place. The likely result would be less competition and higher premiums.

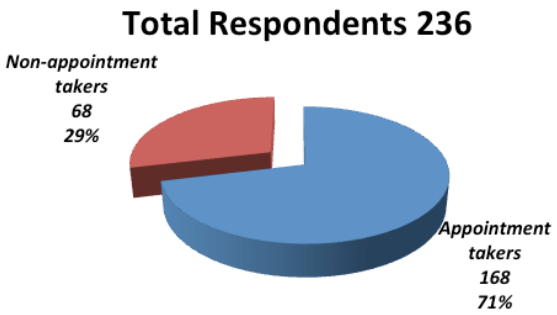
A further point mentioned by the insurer was that subscribing to ATE insurance had a very positive effect on early and effective settlement of actions. It was the experienced view of the insurer that, as soon as proceedings are issued, often within 6 -9 months of initial efforts to settle, the notice of funding goes in and if the claimant IP is insured, the ATE insurance tends to encourage settlement soon thereafter. One consequence of a system of qualified one-way costs shifting would therefore be that cases would not settle so readily.

43 I am most grateful to Mr Oliver for his kind permission to reproduce his worked examples in this Report. At the time of devising the examples Mr Oliver was at Howes Percival LLP but has since moved to Verisona solicitors & advocates. The examples were created with the assistance of Michael Kain of Kain Knight Costs Draftsmen. A summary of them is considered below in Part 6.

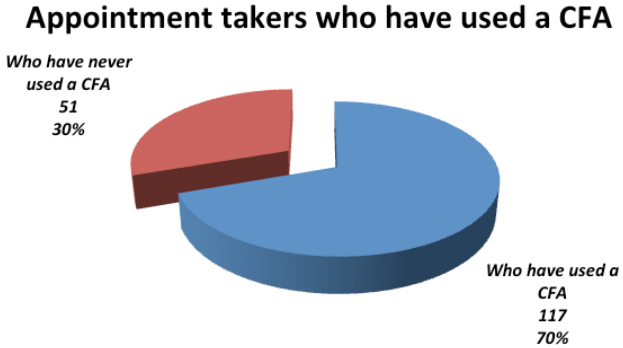
44 See e.g. Chancery Bar Association ANNEX 2 TO RESPONSE To the Ministry of Justice Consultation Proposals for Reform of Civil Litigation Funding and Costs in England and Wales Consultation Paper CP 13/10 November 2010 found at: http://www.chba.org.uk/for-members/library/consultation-response.

B Results of R3 Membership Survey Summer 2013[45]

R3 conducts a survey of its members three times a year. The Summer 2013 Survey incorporated a number of questions specifically relating to the use of CFA-backed insolvency litigation. The questions which were included effectively replicated the questions in Part A of the initial questionnaire. The purpose was to identify the frequency and value of CFA-backed insolvency litigation. The following analysis concentrates on the responses of R3 members who are appointment takers and so excludes those in more junior positions within IP firms and those who are solicitors acting on behalf of IPs. This is so as to avoid double counting of results where possible (although it cannot distinguish appointments with a single office holder from those with multiple office holders).

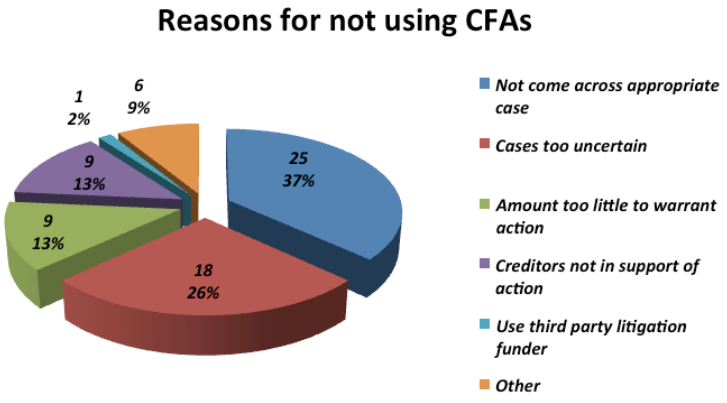


The total number of respondents to the Summer Survey was 236 of which 168 (71%) were appointment takers. The following charts and figures are limited to the results of these appointment takers only. Although neither the IS nor R3 can be certain as to how many licensed IPs actually do take appointments, the consensus appears to be that there are no more than 450-500 appointment takers at any one time. The responses of 168 appointment takers represents 34-38% of that total and is a sufficiently large number to make the results of the survey reliable.

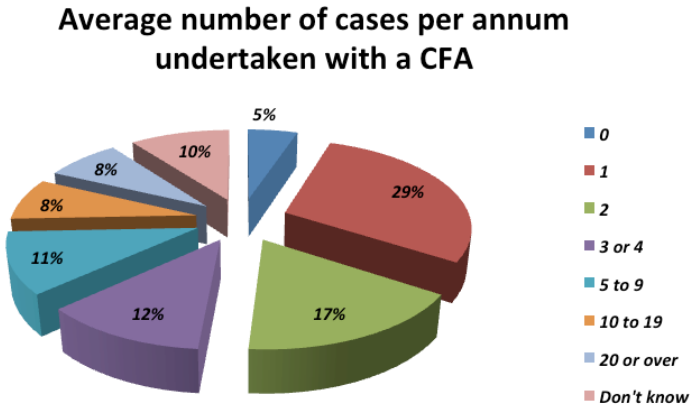


Of the appointment takers who responded, 117 (70%) had at some time in the past used a CFA to support insolvency litigation. This is significant majority and suggests that the use of CFAs is important to the profession.

45 I am most grateful to ComRes for providing the detailed analytical breakdown of these results.

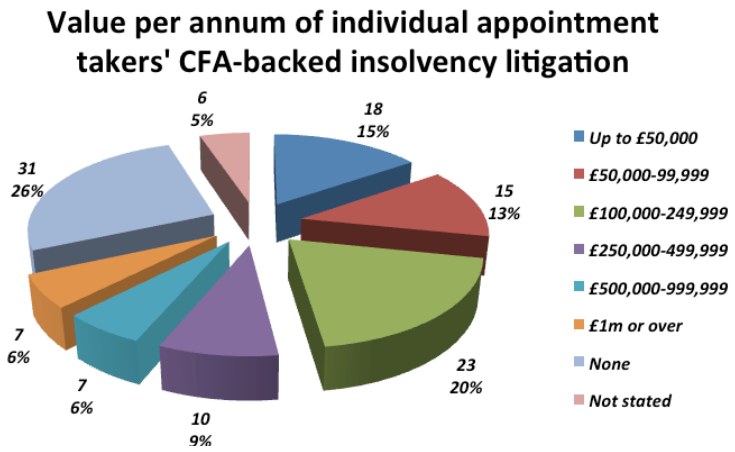


Of the 51 appointment takers who had not ever used a CFA to support insolvency litigation, the main reasons given for such non-use were respectively that the IP had not come across an appropriate case (37%) or that the case was itself too uncertain (26%). It is clear that some firms will only usually take on appointments where the estate has some assets to fund the appointment. In such cases, there will not usually be a need to use a CFA. Sometimes the value of the action does not warrant the time and effort of entering into a CFA (13%) or the proposed action does not have creditor support (13%). Interestingly, only one respondent had used a third party funder in preference to a CFA. This suggests that the types of action which might attract a third party funder are not the types of action which an IP will usually consider using a CFA to enforce. This may be due to the fact that third party funders usually require a very high value claim (often in excess of £3m). Such claims are rare and where they do exist, an IP may be able to find funding from within the insolvent estate or attract financial support from the creditors.



Of the 117 appointment takers who had engaged in CFA-backed insolvency litigation, a majority (51%) engage in an average of 2 or fewer such actions per annum. This supports the view that a large number of IPs engage in CFA-backed insolvency litigation fairly infrequently. A relatively small proportion of IPs (8%) take such action 20 times or more per annum which supports the idea that there is a significant minority of IPs who engage in a great deal of such litigation. The mean average number of actions brought by an appointment taker is 5.3 per annum. This equates to 620 actions

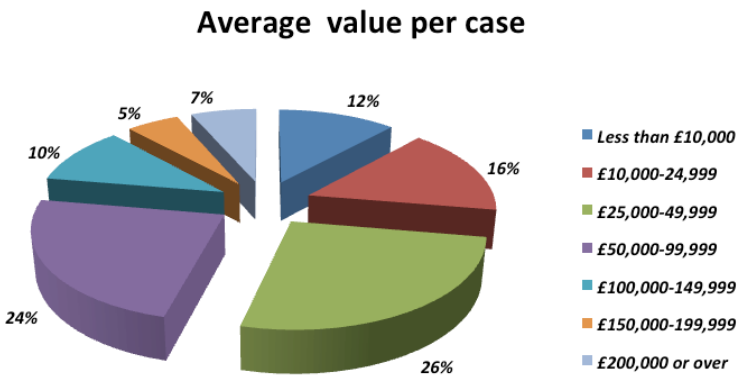
brought annually by the 117 respondents who use CFAs. If this figure is extrapolated to include all appointment takers the number of CFA-backed insolvency actions per annum would be likely to be in the region of 1,600 cases per annum. The feedback from practitioners suggests that figure might be somewhat of a high estimate unless it were also to include, which it might, small claims where there is no formal CFA entered, and the legal team agree that they will only bill their time (with no uplift) if the case is successful.



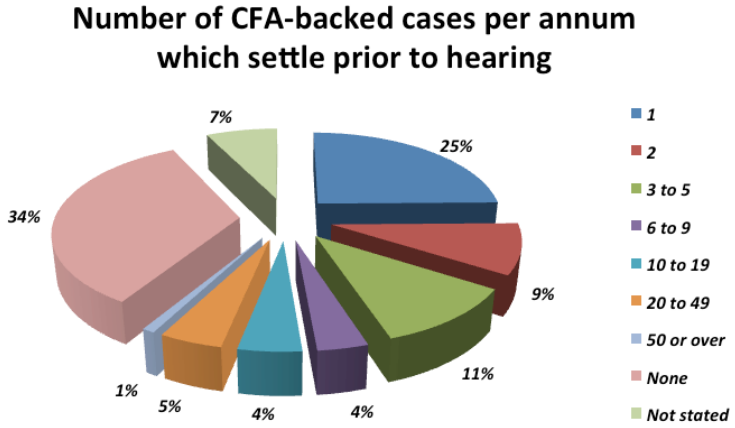
This question asked about the amount per annum brought into insolvency estates by CFA-backed litigation. All 117 respondents who have used CFAs answered this question. It is clear that there is a great deal of litigation which leads to relatively small returns to estates. Just over a quarter (26%) of such litigation leads ultimately to no return to the estate. In such cases, the action may be unsuccessful or the proceeds may be fairly small and used up in costs and disbursements of the IP. A specific case study typical of this type of action is considered in the Part 6 below (Case Study G under the heading *Selected Case Studies provided in response to the initial questionnaire*).

Only a small minority of IPs use CFAs to bring in over £1m per annum (6%). It is interesting to note that the use of CFAs suits the needs of both relatively small claims and far more significant claims. The mean average of value brought into insolvent estates per annum by the use of CFA-backed litigation is £477,900 per appointment taker (which is perhaps surprisingly high given the majority of annual values is below £250,000 but is largely due to the relatively small number of IPs who bring in significantly larger amounts). The total annual figure (for the 117 respondents) equates to £55,914,300.

If this figure is extrapolated to cover all appointment takers the annual figure would be in the region of £150-160m per annum. This contrasts with the figure suggested by the IS statistics above of a total figure for claims of approximately £300m. This suggests a significant difference between the value of claims as initially assessed and the value such claims realise ultimately. There may be a number of explanations for this difference. It is likely that a large majority of claims settle for less than the amount initially claimed. A number of claims fail to realise the full amount of a claim due to the defendant having insufficient assets (examples of such cases would be case numbers 13, 16, 25, 3 and 89 in Appendix 3). Of course, some claims fail altogether. What may be seen as a potentially strong case initially may end up being abandoned once the full facts are known (examples of such cases would be case numbers 10 and 22 in Appendix 3).



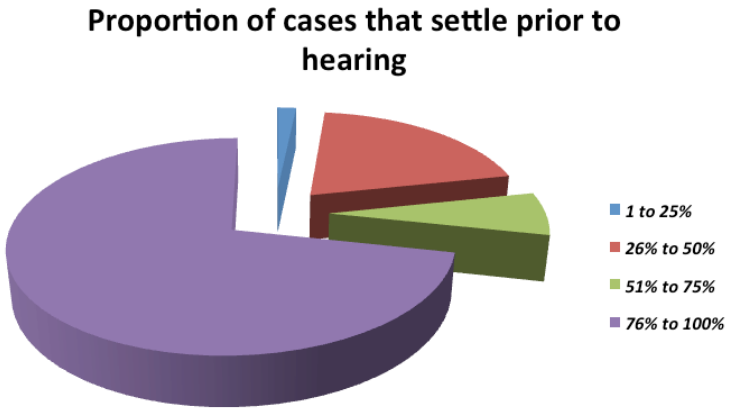
Only 76 of the 117 respondents who have used CFAs answered this question. The answers suggest that the majority of CFA-backed claims brought by appointment takers bring into insolvent estates less than £50,000. Only 7% of claims are for £200,000 or more. The mean average realisation per claim is £77,800. This suggests that a large proportion of CFA-backed cases are being brought for, or at least are realising, relatively small amounts. In speaking extra-judicially about the effect of the Jackson reforms, Lord Neuberger recently referred to the continued use of CFAs, Damages Based Agreements and third party funding in ensuring access to justice where "there is a reasonably sized claim or where there are lots of little claims. But they cannot do the business where the claim is small. And there are plenty of claims which are small and… there are even quite a few claims which are small but important to society."[46] His Lordship's concerns would appear to be fit the position of many IPs. Typically, many IPs have small claims which are important to society in terms of ensuring some compensation to creditors including public sector creditors and important from a public policy point of view in terms of ensuring culpable behaviour in the context of insolvency does not pass without the threat of effective action.



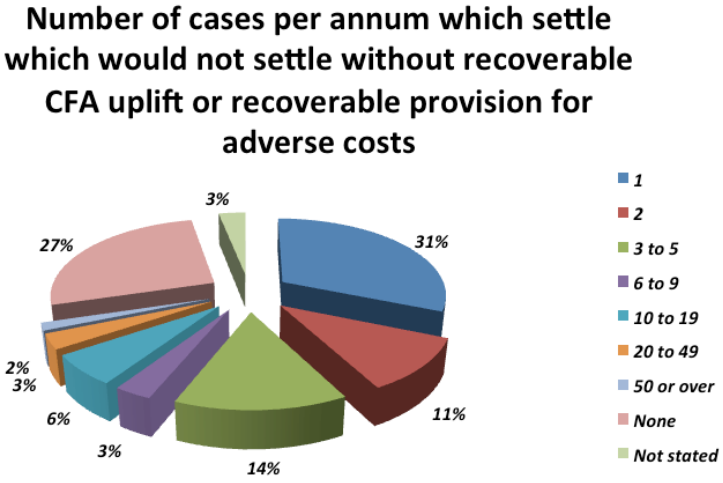
Of the 117 respondents who have used CFAs, 109 answered this question. The number of cases which settle clearly will vary according to the total number of cases that the appointment holder brings. The mean average number of cases which settle is 3.6 per appointment taker.

46 Lord Neuberger, President of the Supreme Court, "From Barretry, Maintenance and Champerty to Litigation Funding" Harbour Litigation Funding First Annual Lecture at Gray's Inn 8 May 2013 at para 55, found at: http://www.supremecourt.gov.uk/docs/speech-130508.pdf.

It is interesting that just over a third of those who answered this question have no cases which settle. This may not be as significant as it first seems as the respondents in question may only use CFAs for one or two claims per annum. The next chart gives a better idea of the overall number of cases which settle.

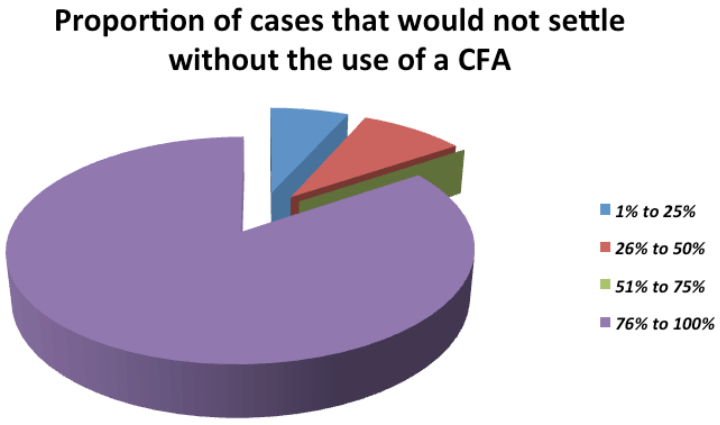


The chart shows the percentage of CFA-backed insolvency litigation which settles prior to hearing. The mean average of all responses was 83%. A very significant majority of all CFA-backed insolvency litigation therefore settles prior to hearing. This is particularly relevant when considering how such settlements are usually structured. When a settlement is made upon the basis of a global amount, the legal team (as well as other stakeholders) will not usually receive full payment of their fee and uplift. The suggestion made by Jackson, that legal costs are often disproportionate where a CFA is used, is less applicable in such circumstances as the uplift is not paid in full and often is not paid at all. Case Study A in *Selected Case Studies provided in response to the initial questionnaire* in Part 6 below is one such case (see also cases 13, 15, 25, 37 and 93 in Appendix 4).



Sixty-four respondents answered this question. There is a wide spread of results which again is indicative of the differing caseloads of appointment takers. The mean average of responses was 3.6 cases settle which would not in the opinion of the appointment taker settle without

recoverability of the CFA uplift or provision for adverse costs. Although there were fewer answers to this question than to the question above about the number of cases which settle (which was answered by 109), it is interesting that the same average number of cases is identified (3.6). This suggests that in relation to all (or virtually all) of the cases which do settle, they would not have settled (at least at the point they did settle) without the potential consequences of recoverability of CFA uplift and provision for adverse costs. This supports the views of all stakeholders who were interviewed to the effect that although CFA uplifts and ATE insurance premiums are infrequently recovered in full, the threat of such a recovery does concentrate the minds of defendants and is often decisive in reaching a settlement.



As can be seen from this chart, the view of appointment takers is overwhelmingly that many cases would not settle without the use of a CFA with recoverable uplift. The mean average is 89%. It is clear from this that the use of CFAs in insolvency litigation is viewed by practitioners as extremely persuasive in encouraging a defendant to settle. This view is entirely consistent with nearly all the comments to similar effect made by interviewees. A concern expressed by practitioners was that without recoverability of CFA uplifts and ATE insurance premiums, far more cases will go to trial with the consequence that returns to creditors will be reduced.

6 Likely effect of Jackson on insolvency litigation

The above figures and analysis attempt to go some way to fill the void in the knowledge base as to the use and effectiveness of CFAs (and ATE insurance) in insolvency litigation under the current regime. It is not possible to quantify with certainty how many of these cases would not be brought under the Jackson reforms. It is clear that some of these cases would be less likely to be taken up under Jackson. A number of points may be made in relation to the likely effect that Jackson would have on eventual returns to creditors.

On a relatively simplistic level, the obvious difference would be that the CFA uplift and ATE insurance premium would come out of any damages awarded (or settlement figure if the matter did not get to court). This would reduce the amount available to creditors. I am most grateful to Nick Oliver[47] who has permitted me to reproduce some worked examples he devised in 2011 (with the assistance of Michael Kain[48]) as to the monetary impact upon creditors that Jackson would have in a typical but significant claim of £1,400,000. These worked examples are included in full in Appendix 4. The net recovery for the estate is estimated in Scenario 1 under the current regime at four different possible points in time ranging from settlement prior to action through to success in court. The same calculation is made for net recovery to the estate if Jackson were to be applied (Scenario 2). A simplified summary of the worked example (excluding a possible third scenario where qualified one way costs shifting applied) is reproduced here.

Stage	Description	Net recovery for estate (£)	
		Scenario 1 (Current regime)	**Scenario 2** (No recoverability of CFA success fees or ATE)
1	Settlement pre issue – 'Global' settlement (including costs)	804,250	778,000
2	Settlement post issue (after 12 months) with costs paid by the defendants	800,500	568,000
3	Settlement post issue (after 12 months) – 'Global' settlement (including costs)	562,750	446,500
4	Win at Trial (18 months after issue)	753,000	375,500

The worked example shows clearly that the effect of Jackson would be to reduce the amount available to creditors. Under the current regime, the returns are clearly significantly higher than they would be if Jackson applied to the same action. The most significant differences are found where settlement occurs after issue of proceedings with costs paid by the defendants (£232,500) and where the liquidator wins at trial (£377,500). The global settlement figures for early settlement show a difference of £26,250 and for settlement after issue of proceedings, a difference of £116,250.

47 At the time of devising the examples Mr Oliver was at Howes Percival LLP but has since moved to Verisona solicitors & advocates.
48 Of Kain Knight Costs Draftsmen.

A point made by a number of stakeholders was that the effect of Jackson would be that IPs would be keen to settle a claim earlier and for a lesser amount than they would at present. The worked example would support this idea as the longer the claim is dragged out, the less will be the overall return to creditors. A competent adviser to any defendant would be aware of this. The effect of their advice to the defendant would be to lead to a settlement figure significantly less under Jackson than would be the case under the current regime. It is not possible to quantify how much of a discount there would be on a settlement figure but of course any reduction would lead to even fewer funds being available to the creditors.

A Selected Case Studies provided in response to the initial questionnaire

The 18 respondents to the initial questionnaire sent out to practitioners were asked to provide details of individual case studies with an assessment as to what effect, if any, Jackson would have on such case studies. The following is a selection of such case studies.

Case Study A involved a company in compulsory liquidation where the liquidator made claims against a director under ss 212, 213 and 214 of the Act for respectively, misfeasance, fraudulent trading and wrongful trading. After exchange of witness statements the claim was settled for a global figure of £1.5m. Of this figure £728,793 went to unsecured creditors (with £700,000 paid to HMRC). The solicitors' work-in-progress totalled £170,113 excluding a 100% uplift but billed only £102,801. Counsel's work-in-progress amounted to £84,460, again excluding a100% uplift, but billed £120,000 (in effect claiming work-in-progress with an uplift limited to approximately 40%). This case appears to be fairly typical of cases where HMRC are the main creditor and there is a good realisation of the claim. HMRC tend to suggest a figure which they would regard as acceptable and when a global settlement figure is agreed, the IP and the legal team reach agreement between themselves as to how much of their own billable time each are able to write off. It appears common for both IPs and solicitors to write off a larger percentage of their work-in-progress than counsel. This may be due to the different business model of counsel as effectively a sole practitioner. It was stated by the solicitors in this case that without recoverability of the CFA uplift the action would not have been taken as counsel would not have agreed to take on the case.

Case Study B involved a contractual claim in a liquidation. Sanction was obtained from the Liquidation Committee and the claim was settled one month before trial after the case management conference. The claim settled for £500,000, all of which was available to the unsecured creditors. Of this, £100,000 was paid to HMRC. The legal team's basic fee was £46,000 (with a 50% uplift of £23,000) and the ATE insurance cost £11,600. Both these were recovered from the defendant. Without recoverability of the uplift and the ATE insurance premium, the solicitors' assessment was that the claim would not have been pursued but would have been written off.

Case Study C was a company which was initially in administration but subsequently went into creditors' voluntary liquidation. The action was for misfeasance (under s 212) and in relation to a voidable preference (under s239). The matter was settled for a global figure of £180,000 prior to issue of proceedings. Of this figure, £14,000 was available to unsecured creditors with £5,000 of that going to HMRC. The basic legal fee was £35,000 with an uplift of 80%. ATE insurance was not taken out. The view of the office holder was that no action would have been taken unless the CFA uplift had been available (unless, as was unlikely, the creditors agreed to fund the litigation).

Case Study D involves a claim under s238 in a compulsory liquidation. The sanction of the Liquidation Committee rather than the Secretary of State was sought. The claim is ongoing but is for £650,000. The claim is supported by a third party funder who will retain 45% of the proceeds if the claim is successful. The lawyers are acting on a CFA basis. The liquidator stated that without the recoverability of the CFA uplift and ATE insurance premium, the appointment would not have been taken on.

Case Study E is a bankruptcy case where action was taken to recover hidden assets. The value retrieved was £2.5m with the whole amount being available to unsecured creditors. Of this amount, £1.5m was distributed to public sector creditors. The total base legal fee was £125,000 with an uplift of 100%. The trustee in bankruptcy's view was that the action might "possibly" have been taken even if recoverability of the uplift was not available. If the uplift was not recoverable it would have been payable out of the damages and so would have led to a lesser amount being available to the creditors.

Case Study F was a bankruptcy claim under ss 339 and 340 (transaction at an undervalue and preference). Under the terms of a consent order the estate benefitted from a total payment of £159,000 of which £42,000 was paid to unsecured creditors. Of this figure, £38,000 went to public sector creditors. The solicitors' basic fee was £10,000 and counsel's basic fee was £4,000. Both solicitors and counsel waived their uplift. The ATE insurance premium was £3,000. Without the possibility of the recoverability of the uplifts and ATE insurance premium, the trustee in bankruptcy's view was that the action would not have run. There would have been some attempted negotiation but the claim would probably have been abandoned.

Case Study G was a bankruptcy claim to avoid a preference under s340. The case was settled when the solicitors threatened court action. The action settled for £26,000. There were insufficient funds to pay a dividend to unsecured creditors. The solicitors' fees amounted to £10,000 with a 50% uplift. No ATE insurance was taken out. Expenses which were paid included the £3,000 costs of a local authority who had petitioned for the debtor's bankruptcy. The trustee stated that the action would have been dropped if the uplift had not been recoverable (unless the creditors had been prepared to fund the action).

Case Study H is perhaps a good example of a relatively small case which is feasible to pursue under the current regime but which would not be taken up if the Jackson reforms applied. The claim, which is ongoing, is for £54,000. Legal fees are estimated at £37,000. In the opinion of the liquidator, if the uplift (£15,000) and the ATE insurance premium (maximum £23,000) were not recoverable, they would absorb a large proportion of any proceeds even before taking account of the liquidator's own remuneration and necessary disbursements. If Jackson applied to such a claim, the liquidator's view is that it "would almost certainly not have been pursued."

It is of course the case, that views expressed by practitioners as to which cases would and would not be pursued, are, in effect, self-made evidence and capable of being seen as less convincing for that reason. That said, it appears clear from speaking to practitioners and other stakeholders, that a good many cases which are currently pursued, would not be seen as sufficiently attractive under Jackson for practitioners and ATE insurers to take on. Jackson would seem most likely to affect relatively smaller claims. The R3 Summer Survey suggests that over half of CFA-backed actions are for £50,000 or less and therefore it is possible that many of these cases would not be taken in future once the Jackson reforms are applied to insolvency litigation.

B Further Points Made by Stakeholders

There was a general consensus amongst all stakeholders that the effect of Jackson on insolvency litigation would lead to fewer cases being pursued with a consequently reduced return to creditors. Smaller cases, or mid-value cases which were complex, seem the most likely to fall by the wayside. Cases which would still be pursued would be likely to settle for a lesser sum than at present and defendants would be more likely to drag out any settlement negotiations and be more likely to allow the matter to go to court. In addition to less money being available to creditors, this would lead to more court time (and expense) being taken up by such litigation.

There is anecdotal evidence from a number of sources that specialist insolvency counsel who have conducted CFA work in the past are beginning to refuse to take on any further cases. The concern expressed by some IPs and solicitors is that without experienced and knowledgeable counsel to conduct this often quite complex type of litigation, many actions, including those of high value, will no longer be pursued. The potential consequences for the public interest in this context may be significant. If fewer cases are brought and the pool of practitioners willing to bring such cases dwindles, this would create a clear encouragement for dishonesty or malpractice on the part of bankrupts and directors.

A liquidator in a compulsory liquidation and a trustee in bankruptcy have a statutory duty to pay amounts received into the Insolvency Services Account ("ISA).[49] A liquidator in a compulsory winding up or a trustee in bankruptcy who wishes to trade the business of the company or bankrupt using funds not belonging to the insolvent estate, may with the sanction of the Secretary of State open and operate a local bank account for that purpose.[50] A good number of sanctions requests received by the IS are for permission to trade and open a separate account. This does not detract from the fact that money belonging to the estate must be paid into the ISA. Fees are payable for the use of the ISA.[51] These fees may account for a reasonable proportion of assets which would otherwise be available to the creditors (see for example case number 5 in Appendix 3).

Prior to any fees being drawn by the IP, or his or her legal team, any amounts outstanding to the Official Receiver must first be satisfied. It is commonly the case that an IP will take on an appointment where the estate owes one or two thousand pounds in accrued Official Receiver fees. Without the successful action of the IP this money would not be recovered. Although these sums may not be enormous in any individual case, they do add up. It has not been possible to establish a likely annual figure for these costs but it would be, at a minimum, in the hundreds of thousands of pounds.

IPs and lawyers who are profitable do pay their taxes. In the context of insolvency litigation, the defendants are usually culpable in some way and it is frequently their money which is used to pay the IP and lawyers. Many practitioners made the point that the tax income to HMRC of successful actions by IPs and lawyers is considerable. The effect of Jackson on insolvency litigation would lead to a decrease in fee income and a necessary decrease in tax income to HMRC.

49 Insolvency Regulations 1994 (SI 1994/2507) regs. 5 and 20.
50 *Ibid* regs 6 and 21.
51 Insolvency Practitioners and Insolvency Services Account (Fees) Order 2003 (SI 2003/3363).

7 Summary of findings

Although data has not always been easy to collect, it has been possible, by considering different sources of information, to put together a reliable picture of how CFAs and ATE insurance operate in the context of the current insolvency litigation system. It is clear that a great many insolvent estates (both individual and corporate) have no assets available with which to fund litigation. The use of CFAs has become increasingly common across all types of IP firm from the smallest sole practitioner practice to three of the "Big Four". The claims being enforced by CFA-backed insolvency litigation appear likely to total approximately £300m per annum. Of this figure, between £50m and £70m will relate to monies owed to HMRC. Over half of this figure appears eventually to be brought into insolvent estates.

On a simplistic level, it is clear that if Jackson were introduced to insolvency litigation, the fact that the IP's legal costs would need to be paid out of any damages award, would necessarily lead to a significant reduction in realisations to creditors. The effect of Jackson would be more subtle than that. The effect is likely to be that the majority of CFA-backed claims (certainly those for less than £50,000) are far less likely to be pursued by IPs. Although in reality, the CFA uplift (and ATE insurance premium) are rarely paid in full and often not paid at all (even where the insolvency litigation has been successful), the existence of the risk to defendants of having to satisfy such claims, does concentrate their minds. The current system does encourage a large majority of claims to settle. The view of practitioners is that Jackson would lead to fewer cases being brought and of those that are brought, fewer would settle. Those that would still settle would settle for a lesser amount.

8 Main criticisms of recoverability made by Jackson – are they applicable to insolvency litigation?

Although it is clear that insolvency litigation is quite different in a number of respects to the type of litigation which was explicitly under the Jackson spotlight, it is of course, still possible that some of Jackson's criticisms still apply to insolvency litigation. The ministerial foreword to the Government's Consultation on Jackson expressed the Government's general concerns in the following way:

> *"Given that many claims are brought against central and local government under CFAs, the additional costs of the current arrangements – in the form of recoverable success fees and after the event insurance premiums – impose a significant costs burden on the taxpayer. Implementing Sir Rupert's proposals will help to maintain access to justice at proportionate costs for claimants and defendants but will also deliver significant costs savings for government. With the current financial position, we are committed to achieving costs savings wherever possible…Disproportionate costs also have implications for the taxpayer who ends up footing many of the bills. In seeking to rebalance the costs of civil cases, we are endeavouring to ensure: that necessary claims can be brought; that reasonable claims should be settled as early as possible; that unnecessary or frivolous claims are deterred; and that as a result costs overall become more proportionate. These principles underpin our approach to reform."*

There appears to be little, if any, evidence that solicitors are taking disproportionate fees in the sense that their fees are greater than the damages or settlement figure being recovered. There does not appear to any evidence which suggests that IPs chase small claims for the purpose of racking up their own fees or the fees of their legal team. It is also true that there is often some incentive for an IP to keep some control of the uplift agreed, especially where a large uplift may lead to his or her own fees not being paid in full.

Although costs usually follow the event, the court retains an ultimate discretion to reduce costs or to refuse to award costs at all in any given case. The case of *Segal v Pasram*[52] highlights how the courts have in the past dealt with what the judge perceived to be too high a CFA uplift. The case concerned a bankrupt's transfer of half the matrimonial home to his wife just prior to his bankruptcy. The transfer was avoided as a transaction at an undervalue. The legal team for the trustee in bankruptcy had entered into a CFA with an 80% uplift. The trial judge was critical of such a high uplift on the facts as the risk of losing was low. Although the judge left the reasonableness or otherwise of the uplift to the costs judge, he ordered that the trustee's costs should be paid as an expense of the bankruptcy and not be payable by the wife.[53]

52 [2007] BPIR 881

53 An enlightening consideration of the court's ability to control the level of uplifts is found in: *Response of Three Costs Judges of the Senior Courts Costs Office* found at: http://www.accesstojusticeactiongroup.co.uk/home/wp-content/uploads/2011/05/RespocostsJudges-Feb11.pdf.

The court therefore remains the ultimate arbiter in deciding whether a CFA uplift was reasonable. On the other hand, the evidence considered above suggests that a large majority of cases never get to court and in such circumstances the CFA uplift will avoid judicial scrutiny. As mentioned above,[54] the evidence goes some way to suggest that there is a lack of consistency in how uplifts are agreed. A number of IPs interviewed made the point that they individually always drive a hard bargain with their legal team as regards base fee and uplifts but were of the view that such a practice is not universal. This is perhaps one area where some guidance from the JIC is desirable.

The problem, highlighted by both Jackson and the Consultation, of "cherry-picking" by lawyers appears to be less of a concern with insolvency litigation. It is clearly the case that IPs and lawyers require there to be "more weddings than funerals," but the evidence suggests that there are still a number of funerals attended and that not all weddings are particularly lavish. It is essential that IPs and their legal teams are paid reasonably and reasonably often for their work otherwise the work will not get done. It is, of course the case, that neither an IP nor a solicitor will take on hopeless cases and will look to litigate only cases where there is a good chance of success. This would be the case whether the insolvent estate has sufficient assets to fund the litigation or not. The evidence suggests that no frivolous or unnecessary actions are being pursued. IPs do take risks when they run a case. In the context of bankruptcies and compulsory liquidations, that risk is often based upon sketchy information from Official Receivers before taking on an appointment. If the information about a prospective cause of action turns out to be inaccurate, or the defendant has more limited means than had been believed, the IP and the lawyers lose out. This is relatively commonplace (see for example cases 10, 13, 16, 22, 25, 37, 49 and 93 in Appendix 3).

In light of the judicial comments considered in Part 3 above, the reality is that most, if not all, claims brought by IPs have dual characteristics. They are intended to bring in money with the intention of making a distribution to creditors but they are also brought in the public interest. They would appear to fall into the category of what the Consultation called "necessary claims". There is no evidence to suggest that they cost the public purse any money and indeed they contribute to the public coffers in a number of significant ways. The view of the practitioners who were interviewed is that such actions need to be encouraged rather than discouraged. The introduction of the Jackson reforms would clearly have a number of significant effects on the effectiveness of the current regime.

54 In Part 5 *A Analysis of Sanctions Requests held by the Insolvency Service for 2010 (Jan-June)*.

9 Possible alternatives to the current system if Jackson were introduced to insolvency litigation

The Government has expressly stated that the insolvency litigation has been provided with a two-year "carve-out" from the Jackson Reforms to give the profession time to come up with some workable alternatives to the current regime. The following appear to be possible alternatives.

A Third Party Funding of Insolvency Litigation

Historically, the common law has taken a dim view of attempts to interfere in litigation by non-parties. The doctrines of barretry, maintenance and champerty were developed in mediaeval times to outlaw assignments of bare causes of action and agreements whereby a party supported or maintained another's action (whether or not in exchange for a percentage of the proceeds of such action).[55] It was confirmed in the nineteenth century that IPs were permitted to assign bare causes of action vested in the insolvent estate for a sum or money or in exchange for a share in the eventual proceeds.[56] This "insolvency exception" survives today. It is also possible for a third party funder to maintain or support an IP in bringing an office holder action on behalf of the insolvent in exchange for a share in the eventual proceeds. Such agreements must not fetter the IP's discretionary powers in terms of which lawyers to use and how to conduct the action generally.[57] The distinction is therefore made between actions vested in the insolvent estate, such as those for breach of contract or breach of fiduciary duty, (which can be assigned under the insolvency exception) and office holder actions, such as wrongful trading under s214 or avoidance of transactions at an undervalue under ss 238 and 339, which are only capable of being brought by the IP (and which cannot be assigned but may be supported by third party funders).

The accusation aimed at third party funders[58] by some of the practitioners who were interviewed is that they take a large percentage of the proceeds of any successful action (up to 50% of the proceeds) and that they take on only a very small percentage of cases offered to them. They "cherry-pick" the actions where a quick solution may be negotiated which is most favourable to the funder and only take on cases where the potential value is very high (typically in excess of £3m). The counter argument from the funders is that without their support, such actions would not be brought at all and the creditors of the insolvent would lose out altogether.

55 For a clear explanation of the development of the law in this area, see Lord Neuberger, President of the Supreme Court, "From Barretry, Maintenance and Champerty to Litigation Funding" Harbour Litigation Funding First Annual Lecture at Gray's Inn 8 May 2013, found at: http://www.supremecourt.gov.uk/docs/speech-130508.pdf.

56 See e.g. *Seear v Lawson* (1880) 15 Ch D 426.

57 See e.g. *Rawnsley v Weatherall Green & Smith North Ltd* [2010] BCC 406.

58 Most but not all funders are members of the Association of Litigation Funders of England and Wales whereby they signed up to a voluntary Code of Conduct for Litigation Funders in November 2011. For the Code see: http://associationoflitigationfunders.com/wordpress/wp-content/uploads/2012/05/CodeofConductforLitigationFundersNovember20111.pdf

The expertise of the funders is used to provide a tangible benefit to creditors which would not exist without their support.

The view of one of the main funders who was interviewed is that a solicitors' or accountants' firm is not the best way to finance big litigation. The business structure does not support big and expensive cases. That is where third party funders come in. They have the specific skills, the appropriate contacts with skilled and experienced lawyers and other professionals and the financial backing to make a success of such claims. They have the knowledge and experience to judge when to take a risk on litigation. Solicitors and barristers are less well equipped to deal with such risk taking and, although there are exceptions, are generally reluctant or unable to take on cases which require large amounts of work-in-progress if the outcome is uncertain. The use of a funder takes away the risk to the IP of any personal liability and avoids the IP running up a great deal of work-in-progress with no certainty of payment.

Based upon material available on various funders' websites (and other publically available material), it appears that, apart from Manolete Partners LLP, funders will only consider large claims. Manolete is the only funder which deals exclusively with insolvency claims. It would appear that the main competition for business is at the top end of the market. For example, Woodsford Litigation Funding Ltd and Harbour Litigation Funding Ltd both require a minimum value of £3m to take on a commercial claim whilst Juridica Investments Ltd focuses on claims exceeding $25m. Burford Capital LLC usually requires a damages to costs ratio or 4:1 and on average finances a claim to the amount of £1m. This suggests an average claim of £4m.

A practical problem faced by funders who consider taking on relatively small claims is that such claims will often require some investigatory work to be carried out by the funder which may lead to the potential claim soon becoming uneconomical. Often investigatory work will be carried out by a funder if a prima facie case is shown in terms of merits of the case and solvency of the defendant. Most, but not all, funders prefer to engage their legal team on CFAs (either full or partial) and will usually take out ATE insurance. At least one funder prefers to pay its legal team its normal rates and generally to avoid CFAs. All of the funders have the benefit of relatively large amounts of capital supporting the business.

From the point of view of the creditors of an insolvent company whose office holder decides to use the services of a funder, the downside is that the funder will take a percentage of the final proceeds of the action. Although each funder has a slightly different model for calculating this percentage, one funder typically pays a small amount for a claim and then splits the proceeds 50/50 with the IP. Other funders do not pay anything up front and provide a sliding scale percentage depending upon if and when the case settles.

The other common criticism of funders is that they only take on a very small fraction of the cases which are offered to them. Some IPs who were interviewed, expressed the view that funders take on only a small number of cases and only those where they believe a successful outcome is extremely likely. The answer to that suggestion might be that the funders are in business to make money themselves and so will wish to pick the strongest and most valuable cases. Unless competition expands significantly, most funders will continue to be able to "cherry-pick" the biggest and best cases. As the market currently stands there appears no appetite nor a need for funders to take on the smaller cases which are common in insolvency litigation.

Despite criticisms of funders, they do appear to fill a genuine gap. Without them, certain large cases might not be brought at all and in those cases, creditors will lose out completely. It is clearly better that creditors recoup a percentage of a large amount than hold onto a claim which will never be pursued due to lack of financial support (see for example, the ongoing claim in Case Study D above in Part 6 Selected Case Studies provided in response to the initial questionnaire).

Due to the strict requirements for both merits of the claim and the likely solvency of the defendant, funders are unlikely to provide an answer to the need to prosecute the large majority of relatively small claims found in insolvent estates. The funding market is in its infancy and may or may not expand to take on more cases. If it fails to expand, the options available to IPs post Jackson will be reduced as the situation will have worsened with no effective replacement for recoverability. Funders are not realistically the answer to the problem which Jackson would create in future whereby lower value cases are no longer pursued.

B Damages Based Agreements

The Damages-Based Agreements Regulations 2013[59] permit fully for the first time in England and Wales contingency fee agreements. The Regulations allow for Damages Based Agreements ("DBAs") whereby a client, such as an IP, may agree with his or her lawyer that the lawyer's agreed fee is contingent upon the success of the case and is determined as a percentage of the compensation received by the client. Prior to 2013, DBAs were only available in employment matters. They are now permitted in most civil cases, including insolvency litigation where the maximum payment which a lawyer may receive is capped in general terms at 50% of the damages (which includes 20% VAT and counsel's fees).

DBAs are intended to encourage lawyers to take on less promising cases due to the potentially higher returns if the case is a success than would be possible under a CFA. As DBAs are based upon a percentage of the damages awarded they do not increase a defendant's costs liability.

There is no evidence, even anecdotal, that DBAs are being used at all in insolvency litigation. There are three main reasons put forward by practitioners for their lack of use. First, they are only being suggested by IPs where the claim is weak and not attractive to solicitors even though the percentage reward being offered is reasonably high. A high percentage of nothing is still nothing. Similarly, there is some anecdotal evidence that some solicitors have offered to act upon the terms of a DBA where the claim is strong and consequently they would do better out of the case than they would under a CFA. In such circumstances the IP would prefer to use a CFA to maximise the realisation for the estate. The second reason suggested for their non-use is that the Regulations are widely believed not to allow a lawyer to enter into a partial DBA. If solicitors could take on a case partly funded and partly under the terms of DBA, there are likely to be some cases where such a hybrid agreement might be entered.[60] The third concern recognised by some practitioners, is that a solicitor, who will benefit from a percentage of any final damages award, may be personally liable for adverse costs if the case is lost. Taken together, the uncertainty surrounding DBAs has caused them to be unpopular generally and in particular in the context of insolvency litigation where CFAs are still seen to be working reasonably efficiently.

59 SI 2013/609

60 The third party funder Burford Capital LLC has its own version of a DBA which appears to avoid the problems of hybrid arrangements under the Regulations. This type of arrangement "would set out Burford's agreement to fund the litigation, and the percentage of damages that would flow to Burford in the event of success. In connection with the funding agreement the law firm and the client would enter into a retainer agreement. Then, a critical third agreement – the Burford Hybrid DBA – is entered into between the law firm and Burford. This agreement sets out the on-going payment terms for the firm as well as the portion of the damages award (the "law firm reward") that will go to the firm in the event of success. (Importantly, this "law firm reward" will come from the proceeds initially collected directly by Burford)." (see http://www.burfordcapital.com/how-we-help-uk/hybriddba).

The Government is understood currently to be looking at amending the DBA Regulations to make DBAs more attractive.

Even if the perceived problems of using hybrid DBAs can be ironed out, there still remains the concern that the effect of a DBA is effectively a contingency fee agreement where a large percentage of any damages may go to the legal team rather than the creditors. DBAs therefore attract similar criticisms to those aimed at third party funders. Assuming the Jackson reforms do come into force with regard to insolvency litigation in 2015, it is certainly likely that a number of claims may be undertaken using DBAs rather than CFAs. It is unclear what the consequence of this would be. It seems unlikely that IPs would be willing to enter in DBAs very frequently as the nature of them may lead to lawyers being paid more than they would under a standard CFA agreement. An IP owes a duty to creditors to realise assets taking reasonable care. It may be that there are not that many cases where 1) from the IP's point of view, a DBA is deemed to be a more reasonable option than a CFA, and 2) there is a competent lawyer willing to take on the case.

C Transparency and Trust

A number of suggestions have been made by the Department for Business, Innovation and Skills ("BIS") designed to increase the public's trust in business. The suggestions are made in a discussion paper whose short title is "Transparency and Trust" (hereafter "the Discussion Paper"). [61]

One suggestion is that certain office holder actions should become assignable. This proposal is limited to the corporate actions of fraudulent and wrongful trading (under ss213 and 214 of the Insolvency Act 1986 respectively). The thought behind this is that third party funders, or others, may find it more attractive to take an assignment of such actions, rather than merely funding such actions whist still under the control of the office holder. There is no clear evidence as to how much of an effect this would have in practice. Of the two third party funders interviewed, one was keen on the prospect of having more causes of action capable of being assigned whilst the other was of the view that it was on occasion difficult to get an office holder to co-operate fully once an action had been assigned but it was less troublesome where the litigation was still under the control of, and in the name of the office holder. There was no great enthusiasm for the proposal. There was a general feeling that if all office holder actions became assignable, including those to reverse transactions at an undervalue and preferences, this would encourage a more vibrant market in causes of action.

The obvious concern that IPs would have, if they were able to assign some or all office holder actions, is that they would need to be careful (as they currently need to be) to assign only genuine claims and not to assign claims which are of only nuisance value. A concern highlighted by some IPs, in the event that a market in such claims becomes widespread would be the potential personal liability of IPs for adverse costs.[62]

A more far-reaching and radical proposal made by BIS is the suggestion that when an individual is disqualified under the Company Directors Disqualification Act 1986, the court may also order the defendant to make a compensation payment to the insolvent company. This would appear, at first blush, to seem like a very workable suggestion but there are a number of potentially insuperable problems attached to it.

61 *Transparency and Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business* Department for Business, Innovation and Skills Discussion Paper 2013.
62 See e.g. the discussion in *Hunt v Aziz* [2012] 1 WLR 317.

It is not yet clear how such a system would work. The criteria for any compensatory award have not been fully articulated. If, for example, an office holder is taking action for wrongful trading (or indeed has assigned such a cause of action) it appears possible that, based upon the same fact pattern, BIS could bring disqualification proceedings and if successful ask for a compensation order against the director in question. It would be against the rules of natural justice for the defendant to be made liable twice for the same conduct and so an issue would arise as to whether the wrongful trading action or the disqualification compensation order would take priority.

A further concern, in the context of such "compendium" actions being brought simultaneously both to compensate creditors and to disqualify directors, is how BIS would select the cases to prosecute. Experienced IPs, when interviewed, frequently reported the perception that in recent years BIS has concentrated its disqualification activity on those directors where the case is relatively straightforward and often ignores more complex and larger cases. As is apparent, the Government, usually through HMRC, is the largest unsecured creditor in most corporate insolvencies. BIS would be in a position of conflict of interest and duty if it pursued cases where the major creditor was HMRC rather than cases where there was minimal or no public sector debt. BIS would also be conflicted if it decided to concentrate on disqualifying directors who owned sufficient assets to cover any possible compensation order rather than disqualifying directors on the basis of their conduct alone.

A related concern is the actual number of director disqualifications per year. Official figures for disqualification of directors show that prior to the introduction of disqualification undertakings in April 2001, total disqualifications were running at 1,700 per annum. This figure briefly went up following the introduction of undertakings, for example, for the year 2001/2 there were 1,929 disqualifications made.[63] For the year 2012/13 this figure has fallen to 1,031 per annum.[64]

If compensatory activity is to be taken over by BIS, one likely consequence will be that office holders will be prevented from taking action themselves when a claim is made based upon the same fact pattern (or at the very least, such office holders will be less willing to do so than at present). The proposed system might work if BIS was pumping huge resources into its enforcement activity but there appears to be no such plan. It is not entirely clear from the Discussion Paper who will foot the bill for BIS's enforcement action but it would seem the cost will be borne by creditors. At para 11.14 of the Discussion Paper it is suggested that the costs of the disqualification process (and the costs of claiming any compensation award) might be covered by the award itself before any surplus is handed over to the liquidator to distribute to the creditors. It would appear from this that the Government, in a time of public sector austerity measures, might be looking to be paid the costs of carrying out its disqualification responsibilities by claiming those costs out of any compensation award it secures, (apparently on behalf of the creditors).

Another potential problem with the proposed system of combining disqualification proceedings with compensation awards is the likely effect it will have on defendants. It seems that at present, a large majority of defendants in disqualification proceedings are content to offer a disqualification undertaking.

63 Figures found at: http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=4&ved=0CFIQFjAD&url=http%3A%2F%2Fwww.insolvency.gov.uk%2Ffreedomofinformation%2Fdu%2Fannuald1.doc&ei=KQd9UvqhO4aAhAeM44GYDw&usg=AFQjCNGqRuZTBxyl6Pe8vT0gZ9lokNxRXA

64 Figure quoted by *Transparency and Trust: Enhancing the Transparency of UK Company Ownership and Increasing Trust in UK Business* Department for Business, Innovation and Skills Discussion Paper 2013.

This is far less likely to be the case if they will also need to pay a compensation award. Far more disqualification cases are likely to be defended than presently and those with reasonably long memories will remember how involved such cases used to be prior to the introduction of disqualification undertakings in 2001. Such cases were often also defended by litigants in person. The effect of the proposed system may well be to clog up the courts with such actions.

At best, the effectiveness of the proposed system is difficult to predict and introducing such uncertainty when the current system has not been found to be fundamentally faulty would seem to be rather risky.

If increased disqualification activity is desirable, and the figures quoted above would suggest that disqualification numbers have fallen in recent years, an easier alternative is readily available and would cost the Government nothing. It is currently possible under s10 of the Company Directors Disqualification Act 1986 for a court to disqualify a director when that director is found liable for wrongful trading under s214. There would appear no obvious reason why this discretionary power could not be extended to cases brought for misfeasance under s212, for transactions at an undervalue under s238 (or s423) or for voidable preferences under s239. Rather than create a new type of compensation order (based upon criteria which have yet to be articulated) which "piggy-backs" on disqualification proceedings, why not allow disqualification orders to "piggy-back" on existing office holder actions (which as explained above are not ordinary civil litigation but have a public interest element already)? A similar scheme could be introduced in relation to bankruptcy office holder actions which could lead to a Bankruptcy Restrictions Order.[65]

D Mesothelioma

Mesothelioma is a rare type of cancer caused by exposure to asbestos. Symptoms may take up to 40 years to appear following exposure. The obvious difficulty facing victims of the disease in obtaining compensation from former employers is that due to the length of time between exposure and the disease becoming apparent, many employers will have ceased to exist and many insurers may not be traceable.

The Government's solution to this singular problem, following the Jackson reforms, is, in general terms, for victims either to be financially assisted in bringing an action against former employers (or their insurers) for compensation or if such an action is not possible, instead to be compensated directly from the Mesothelioma Payment Scheme ("the Scheme"), which will be set up under the Mesothelioma Act 2014.[66] The Scheme will be funded by compulsory contributions levied upon current employers' liability insurers.

There would appear to be no obvious similarity between the claims of victims of mesothelioma and insolvency litigation. It would appear unrealistic to expect, for example, all companies registered under the Companies Act 2006, to provide a contribution to a fund to finance insolvency litigation. Such a scheme might well work effectively, but no stakeholder who, when interviewed, and who discussed such a possible scheme, believed it to be remotely feasible or politically acceptable to any present or future Government.

65 See generally s281A and Schedule 4A.

66 The Act seeks to implement many of the proposals set out in the consultation response 'Government response – Accessing Compensation – Supporting people who need to trace Employers' Liability Insurance' published by the Department for Work and Pensions on 25 July 2012. The consultation and response may be found at: https://www.gov.uk/government/consultations/accessing-compensation-supporting-people-who-need-to-trace-employers-liability-insurance. Reference may also be made to the Act's impact statement published in May 2013 and found at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/198388/mesothelioma-payment-scheme-impact-assessment.pdf.

10 Conclusions

At para 11.2 of the Discussion Paper, BIS makes the following point: "Often, cases are only taken forward on a conditional fee arrangement basis. This option may be less viable in insolvency cases after April 2015" due to the Jackson reforms. In relation to wrongful and fraudulent trading actions, the Discussion Paper is a little more forthright in its Executive Summary, stating at para 56: "if the liquidator does not have sufficient funds to pursue the claim, there will be no way of securing financial redress under these actions for the creditors, however strong the claim."

These comments are official acknowledgements that Jackson will have a significant effect on the amount of insolvency litigation which will be brought once the Jackson reforms are introduced. The likely effect of Jackson will cost creditors (including HMRC) tens if not hundreds of millions of pounds per annum.

The main criticisms of normal civil litigation, which Jackson is directed at remedying, are that costs are disproportionate to the value of the claim and that lawyers "cherry-pick" only the strongest of claims. Jackson and the Government were keen to ensure that any amendments to the system should allow certain types of case, where there is a public interest behind such litigation, to continue to be pursued.

The criticisms made in the context of general civil litigation do not appear applicable to insolvency litigation. The nature of insolvency litigation is different as there is a clear public interest in having such cases brought. The value of such litigation is twofold: firstly, there will be potentially (but not always) a financial benefit to the creditors of the insolvent estate; and secondly, there will be a wider benefit to society in terms of a deterrent effect on further culpable behaviour and the overriding public good of having the system of insolvency regulation fairly enforced. This type of litigation is not ordinary civil litigation. The claims being brought are not frivolous nor do they have disproportionate costs. There is every reason to encourage this kind of litigation. Insolvency litigation has been regarded as a special case for over a century and public policy suggests that it should remain so.

Taking away the IP's weapon of recoverability of CFA uplifts and ATE insurance premiums would be likely to encourage more culpable behaviour by bankrupts and directors at least at the bottom end of the market (where estates commonly have no assets and the potential claim is for £50,000 or less).

Third party funders may be willing to take on a relatively small proportion of the bigger value cases but the smaller cases are highly unlikely to be assigned or funded. The economics of such claims will not add up. IPs and their lawyers will naturally become more selective in identifying cases where the merits of the case, the value of the claim and the financial position of the defendant are sufficiently promising to require action. IPs will also be more selective in taking on appointments where an estate has no assets.

The Discussion Paper suggests one solution to fill the gap which will be created by the introduction of Jackson to insolvency litigation. BIS's proposal is unlikely to work, either technically in terms of the criteria for compensatory awards, or in terms of ensuring adequate resources are made available to bring such claims. BIS's stated intention is to ensure public confidence in the system but Jackson is likely to reduce such public confidence as fewer cases are likely to be

brought in future. Unless BIS has an enormous war chest to invest massively in bringing far more disqualification cases (where in future, compensation awards may be made), it is hard to foresee how the gap in enforcement action brought about by Jackson can be filled.

The current system is not flawless. The apparent lack of consistency in how uplifts are agreed could be the subject of some specific guidance from the JIC. This would counter arguments that lawyers are taking unfair advantage of defendants but it would still provide an incentive for such cases to continue to be brought (even though lawyers frequently do not receive their full uplift and often no uplift at all).

Apart from the need for specific guidance on the setting of uplift percentages, the current system appears fit for purpose. The proposed application of the Jackson reforms to insolvency litigation looks likely to have a negative effect on creditors (both in the public and private sectors) and on public confidence in the rigorous enforcement of the insolvency regime.

Appendix 1

R3 Survey on the effect of the Jackson Reforms

Name
Firm
Contact Details

For the purposes of the survey please consider the following general points:

1. **"Insolvency Litigation"** refers to any form of litigation engaged in by an office holder designed to increase assets available for distribution amongst creditors. Actual proceedings may or may not have been issued. The proceedings may have been office holder actions such as transactions at an undervalue, or actions on behalf of the Insolvent Estate such as breach of duty/contract or possession and sale. The matter may have settled either before or after proceedings were issued.

2. **"Insolvent Estates"** refers to companies in liquidation or administration and individuals who have been made bankrupt.

3. **"The Survey Period"** is limited to Insolvency Litigation which began in the calendar years 2009, 2010 and 2011. For these purposes, litigation begins when proceedings are issued or when a sanction application is made to the Secretary of State (or the court or creditors).

4. * asks you to delete which is not applicable

Part A

Were you involved with any Insolvent Estates which engaged in successful Insolvency Litigation which involved the use of a Conditional Fee Agreement ("CFA") during the Survey Period? **YES / NO***

If **NO**, please briefly explain the reasons why (e.g. never came across a relevant case, creditors not in support, cases too uncertain, cases too low level in terms of money to warrant action, litigation unsuccessful).

If **YES**, please answer the following general questions as accurately as possible **IN RELATION TO YOUR INDIVIDUAL CASELOAD** prior to moving onto Part B.

1	Approximately how many CFA-backed cases per annum, with which you are involved, require the sanction of the Secretary of State?	
2	Approximately how many CFA-backed cases per annum, with which you are involved, do not require such sanction?	
3	Approximately how much value (in total) per annum is brought into Insolvent Estates, with which you are involved, by CFA-backed actions?	
4	Approximately how many per annum of the total number of these CFA-backed cases settle prior to a hearing?	
5	Approximately how many per annum of the cases which settle would not, in your opinion, settle without the use of a CFA with recoverable uplift and/or recoverable provision for adverse costs such as an After-The-Event ("ATE") insurance premium?	
6	Approximately how many per annum of the total number of CFA-backed cases (whether or not they settle) would not, in your opinion, be possible without the use of a CFA with recoverable uplift and/or recoverable provision for adverse costs such as an ATE insurance premium?	

Part B

Please complete the following table 3 times with separate examples of Insolvency Litigation which took place during the Survey Period. Please select cases which are typical of your case portfolio.

If you are unable to complete 3 please complete as many as possible.

If it saves time please do feel free, instead of completing the table for each case, to email copies of relevant progress or final reports which have been provided to creditors, the court and/or Companies House. Her Majesty's Courts and Tribunals Service has consented to practitioners providing this information for the purposes of this research project.

If you are able to complete more than 3 copies of the table, please "copy and paste" the table the appropriate number of times.

Name of Insolvent Estate (and, if possible the court reference number)/Project Name	
Type of Insolvent Estate	
Cause of Action	
Was the sanction of the creditors, the Secretary of State or the court required?	YES / NO*
(If **YES**, please specify whose sanction was requested)	
Was the Insolvency Litigation funded by a third party funder?	YES / NO / Partly*
If **YES** or **Partly**, what percentage of the proceeds of the action was recovered by the Insolvent Estate?	
Was the case settled?	YES / NO*
If **YES**, at what stage was the matter settled?	
What was the ultimate value to the Insolvent Estate of the Insolvency Litigation?	

How much of this value was available for distribution to unsecured creditors?	
What was the total amount available for distribution to the unsecured creditors?	
How much was distributed to public body creditors (e.g. HMRC or local authorities)?	
What was the total basic fee charged by the legal team under the CFA?	
What was the percentage of the CFA uplift?	
Did you take out ATE insurance?	YES / NO*
If **YES**, how much was the premium?	
Would this case have run if either the CFA uplift or ATE insurance premium had not been recoverable?	YES / NO*
If **NO**, what would you have done instead?	
Name of Insolvent Estate (and, if possible the court reference number)/Project Name	
Type of Insolvent Estate	
Cause of Action	
Was the sanction of the creditors, the Secretary of State or the court required?	YES / NO*

(If **YES**, please specify whose sanction was requested)	
Was the Insolvency Litigation funded by a third party funder?	YES / NO / Partly*
If **YES** or **Partly**, what percentage of the proceeds of the action was recovered by the Insolvent Estate?	
Was the case settled?	YES / NO*
If **YES**, at what stage was the matter settled?	
What was the ultimate value to the Insolvent Estate of the Insolvency Litigation?	
How much of this value was available for distribution to unsecured creditors?	
What was the total amount available for distribution to the unsecured creditors?	
How much was distributed to public body creditors (e.g. HMRC or local authorities)?	
What was the total basic fee charged by the legal team under the CFA?	
What was the percentage of the CFA uplift?	
Did you take out ATE insurance?	YES / NO*
If **YES**, how much was the premium?	
Would this case have run if either the CFA uplift or ATE insurance premium had not been recoverable?	YES / NO*

If **NO**, what would you have done instead?	
Name of Insolvent Estate (and, if possible the court reference number)/Project Name	
Type of Insolvent Estate	
Cause of Action	
Was the sanction of the creditors, the Secretary of State or the court required?	YES / NO*
(If **YES**, please specify whose sanction was requested)	
Was the Insolvency Litigation funded by a third party funder?	YES / NO / Partly*
If **YES** or **Partly**, what percentage of the proceeds of the action was recovered by the Insolvent Estate?	
Was the case settled?	YES / NO*
If **YES**, at what stage was the matter settled?	
What was the ultimate value to the Insolvent Estate of the Insolvency Litigation?	
How much of this value was available for distribution to unsecured creditors?	
What was the total amount available for distribution to the unsecured creditors?	

How much was distributed to public body creditors (e.g. HMRC or local authorities)?	
What was the total basic fee charged by the legal team under the CFA?	
What was the percentage of the CFA uplift?	
Did you take out ATE insurance?	YES / NO*
If **YES**, how much was the premium?	
Would this case have run if either the CFA uplift or ATE insurance premium had not been recoverable?	YES / NO*
If **NO**, what would you have done instead?	

Appendix 2

R3 MEMBERSHIP SURVEY JUNE 2013		
SAMPLE DEFINITION	R3 members	
SAMPLE SIZE	c. 400 / 500	
QUOTAS	None	
METHODOLOGY	Online	
TIMINGS (IF KNOWN)	Questions	1st July
	Scripting	2nd – 3rd July
	Fieldwork	4th July – 15th August
	Headline findings	27th August

JACKSON REFORMS

18. [ASK ALL]
Have you ever pursued any insolvency litigation using a Conditional Fee Arrangement (CFA)? *Please select one response only* [SINGLE RESPONSE]

a) Yes

b) No

19. [ASK ALL WHO CODE A AT Q18]
On average, approximately how many cases per year do you undertake using a CFA? [OPEN NUMERIC]

a) [OPEN NUMERIC]

b) Don't know

20. [ASK ALL WHO CODE B AT Q18]
Which of the reasons listed below, if any, explain why you have not pursued any insolvency litigation using a CFA?
Please select all that apply [MULTIPLE RESPONSE, RANDOMISE OPTIONS A-E]

a) I haven't come across cases where the use of a CFA would be appropriate

b) I use litigation funders instead

c) Creditors not in support of the action

d) Cases too uncertain

e) The amount of money was too low to warrant action

f) Other, please state [OPEN TEXT BOX]

g) None of the above [EXCLUSIVE]

21. [ASK ALL WHO CODE A AT Q18]
Looking back at your individual caseload, approximately how much value (in total) per annum is brought back into Insolvent Estates, with which you are involved, by CFA-backed litigation?
Please enter your answer in pounds sterling (£) [OPEN NUMERIC]

a) [OPEN NUMERIC]

b) None

22. [ASK ALL WHO CODE A AT Q18]
Looking back at your individual caseload, approximately how many, per annum, of the total number of the CFA-backed cases settle prior to a hearing? [OPEN NUMERIC]

a) [OPEN NUMERIC]

b) None

23. [ASK ALL WHO CODE A AT Q22]
Looking back at your individual caseload, approximately how many of the cases which settle per annum would not, in your opinion, settle without the use of a CFA with recoverable uplift and/or recoverable provision for adverse costs, such as ATE insurance premium?
[OPEN NUMERIC]

a) [OPEN NUMERIC]

b) None

Appendix 3

Insolvency Service Sanctions Requests – Compulsory Liquidations using CFAs in 2010

No.	Action (numbers refer to sections of the Insolvency Act 1986)	Value of action £	Likely Base Legal Costs excluding VAT and Disbursements	Chance of Success	ATE etc	CFA uplift %	Status of Liquidation as at 31/12/2013
1	238	262,500	30k	Good	ATE	100%	Ongoing
2	Freezing order by prov liqor 212, 238, 239, 423	1.5m	300k	75%	HMRC indemnity	75%	Ongoing
3	238, 212, 423, 239	86,947	20-25k	good	ATE if issue	100%	Dissolved – IP contacted - no response
4	212	33k	Not stated	good	ATE if issue	100%	Dissolved – case settled at £42,580 which included legal fees totalling £25,400 and ATE insurance £2,652. Liquidator's fees £15,571. No dividend for creditors.
5	127	93,500	29k	good	none	50%	Dissolved - case settled at £93,500 – the only asset – legal fees £31,480 – forensic investigation fee £16,500 – ATE insurance £10,762 – liquidator's fees £22,161. With various other disbursement such as ISA Banking fees of £7,458, there was no dividend for creditors
6	Disclosure	600k	2k	reasonalble	none	Nil	Ongoing
7	212	18,623	1,500	good	none	Nil	Ongoing
8	238, 239	300- 600k	25k	51-60%	ATE	80%	Dissolved – £375,376 recovered plus recovery of legal fees of £138,288 (out of total legal fees of £178,569). Liquidator's fees of £122,033. Total payment to creditors (including HMRC) of £145,255.
9	234	250k	20k	good	none	100%	Dissolved – IP contacted - no response
10	238	108k (nb HMRC main creditor £80k)	25k	70%	ATE	75%	Dissolved – action under s238 not commenced – it had been based on an inaccurate valuation – no assets in estate – all time of liquidator written off £6,542 (and £220 disbursements) and that of the solicitors and valuer (both operating on a CFA basis)

No.	Action (numbers refer to sections of the Insolvency Act 1986)	Value of action £	Likely Base Legal Costs excluding VAT and Disbursements	Chance of Success	ATE etc	CFA uplift %	Status of Liquidation as at 31/12/2013
11	212	122,783	7,500	good	none	100%	Ongoing
12	212	146k	7,500	good	none	100%	Ongoing
13	212, 238	120k	50k incl uplift	60%	ATE	67%	Dissolved – claim against director the only asset in the estate - due to limited resources of director, case settled for global amount of 60k – legal fees base cost 36,648 – solicitors waived success fee – ATE 6,497 – liquidator's remuneration 10,951 – other disbursement prevented dividend to creditors
14	Recovery	100k	30k	85%	none	55%	Ongoing
15	Recovery	186k	12,031	65%	ATE	100%	Dissolved – settled for global figure of 130k – other assets 30k – liquidator remuneration 28,326 – legal costs sols and counsel 44,350 with sols waiving uplift – ATE 14,175 - prefs paid in full (8,500) and 15p dividend to non pref creditors (35K)
16	212, 213, 214, 238	446,578	9k	Good	none	75%	Dissolved – no action taken against the two directors – one had no assets and the other was bankrupt – no evidence of transaction at undervalue – no other assets in the estate - liquidator's remuneration of 21k written off – no payment to solicitors – no dividend
17	212	290k	15k	65%	ATE if issue	50%	Ongoing
18	213, 423	2m	175k	60-70%	ATE	100%	Ongoing
19	212, 213, 214	200 - 400k	100k	70% very good	ATE	80%	Ongoing
20	Recovery of loan	66,667	6k	Likely	ATE	50% (only one creditor HRMC)	Dissolved – settled for total figure of 83,321 which included 6,748 plus VAT legal fees. Total liquidator's fees 13,105. Payment of 74p dividend to single creditor HMRC – 58,485 of proof for 79k
21	212 and debt	388k	10k	good	none	100%	Ongoing
22	212, 213,214	162k	20k	60-70%	ATE if issue	Not yet agreed	Dissolved – no action taken following investigation – no fee to solicitors – liquidator's remuneration 7k with 16,370 written off – investigation fee 4,500 with 32,650 written off – no dividend

No.	Action (numbers refer to sections of the Insolvency Act 1986)	Value of action £	Likely Base Legal Costs excluding VAT and Disbursements	Chance of Success	ATE etc	CFA uplift %	Status of Liquidation as at 31/12/2013
23	212, 213, 214	1.5m	120k plus	75%	HMRC indemnity	50%	Ongoing
24	238, 423, 212	77k	20k	good	none	100%	Ongoing
25	212	63k	7,500	Good	None	100%	Dissolved – due to defendant's lack of resources, global settlement for 30k – legal fees in total 6,102 – liquidator's fees 16,824 (with about 20k written off) – no dividend possible
26	212	127k	17k	good	ATE	100%	Dissolved – IP contacted - no response
27	214	335k	225k	70%	ATE	100%	Ongoing
28	212, 213	8m	118k	Very strong	HMRC indemnity	Not stated	Dissolved – IP contacted - change of firm awaiting response from former firm
29	212	610k	unknown	Not clear at present	none	100%	Ongoing
30	212	49k	7,500	good	none	100% (nb main creditor HMRC)	Ongoing
31	212, 238	1m	100k	good	ATE	50% (HMRC the main creditor but not funding)	Ongoing
32	238, 239	130k	15k	good	ATE	50%	Ongoing
33	127	39k	7k	excellent	none	10%	Dissolved – claim the only asset of the estate – total amount recovered including costs 49k – prefs paid in full (3,858) – non prefs paid 23p dividend (25,728) – legal costs 6,685 – liquidator's fee 7,750
34	Illegal dividends	150k	70k	50%	Creditor indemnity without limit	72%	Dissolved – IP contacted - no response
35	Contract claims	2,325k	40k	Very strong	ATE and HMRC indemnity	50%	Ongoing
36	238	529k	45k	good	ATE	100%	Ongoing
37	Illegal dividends	96,500	10k	good	none	100%	Dissolved – due to defendants' lack of resources claim settled for 17,500 – sols' fees 3,130 – liquidator's fees 8,751 (with 8k written off)

No.	Action (numbers refer to sections of the Insolvency Act 1986)	Value of action £	Likely Base Legal Costs excluding VAT and Disbursements	Chance of Success	ATE etc	CFA uplift %	Status of Liquidation as at 31/12/2013
38	236, 213	4m	75k	good	HMRC indemnity up to 10k and ATE	100%	Ongoing
39	212 and current account overdrawn	1,319,169	7,500	good	none	100%	Ongoing
40	212, 214	792k	70k	Good 60-65%	ATE	80%	Dissolved – IP contacted - no response
41	Debt	300k	Not known	Not known	None	35%	Ongoing
42	Debt	200k	95k	Not known	None	100%	Ongoing
43	238	15m	50k	75%	None as yet	nil	Ongoing
44	Loan account overdrawn	135k	16,500	Very good	none	60%	Ongoing
45	212	100k	150k	Very good	ATE	100%	Ongoing
46	Debt	77k	45k	65%	ATE	70%	Ongoing
47	Breach of contract	143k	61k plus	good	ATE	Not stated	Ongoing
48	213	338k	75k	65%	ATE 100k and HMRC indemnity 30k	50% (HMRC 92% creditor)	Ongoing
49	Loan account overdrawn	22k	17k incl 25% uplift	confident	none	25% (no dividend to creditors possible)	Dissolved – claim settled ultimately for global figure of 16k – solicitors claimed only £6,913 and liquidator, although having time costs of £27,753, only claimed £6,861 remuneration – no dividend possible as the 16k was the only asset
50	238, 423	589k	155k	60%	ATE	Investigation 100% legal proceedings 50%	Ongoing
51	213, 214, 238, 239, 423	250k	100k	65%	ATE	75%	Ongoing
52	212, 423	400k	35k	70%	ATE	50%	Ongoing
53	Recovery	46k	1k	65%	HMRC indemnity	50%	Ongoing
54	Illegal dividend	400k	Not known	Arguable according to counsel	ATE	75%	Ongoing

No.	Action (numbers refer to sections of the Insolvency Act 1986)	Value of action £	Likely Base Legal Costs excluding VAT and Disbursements	Chance of Success	ATE etc	CFA uplift %	Status of Liquidation as at 31/12/2013
55	Prof negligence	250k	35k	good	ATE	50%	Ongoing
56	212	5m	10k	Good over 50%	ATE	75%	Ongoing
57	238, 239, 423	10k	7,500	good	ATE	100%	Ongoing
58	238	121k	50k	uncertain	ATE	85%	Dissolved – IP contacted - no response
59	Loan account overdrawn	96k	15k	65%	ATE	50%	Ongoing
60	212, 238, 239	100k	10k	good	ATE	50%	Ongoing
61	Loan account overdrawn	194k	15k	65%	ATE	50%	Ongoing
62	238, 239, 213	650k	50k	75%	HMRC indemnity main creditor	65%	Ongoing
63	Loan account overdrawn	206k	86k	70%	ATE	54% sols 100% counsel all go to bank under FC	Ongoing
64	212, 238, 239, 423	74k	6,500 plus or 12,500 plus if defended	75%	ATE	75% HMRC only creditor	Ongoing
65	212, 214	650k	100k	good	ATE	65%	Ongoing
66	212 and loan account overdrawn	62k	15k	65%	ATE	50%	Ongoing
67	214	544k settlement figure – sanction straight to settlement without issue	In total 160k but sols will accept less	-	Would have gone with ATE	100% HMRC in favour of settlemetn and 97% creditor	Appears to be ongoing – no record of final meeting of creditors
68	238, 423	120k	10k	strong	none	15-20%	Ongoing
69	212, 214	217k HMRC major creditor	10k	strong	HMRC indemnity up to 10k	30%	Ongoing

No.	Action (numbers refer to sections of the Insolvency Act 1986)	Value of action £	Likely Base Legal Costs excluding VAT and Disbursements	Chance of Success	ATE etc	CFA uplift %	Status of Liquidation as at 31/12/2013
70	213	1,374k	163k	strong	none	0-100% depending on extent of recovery	Ongoing
71	127, 212	3.6m	15k	high	ATE	100% little time for investigation yet, so claim uncertain	Ongoing
72	212, 213, 423	825k	15k or 40k if defended plus	Counsel opinion	ATE	100% HMRC only creditor	Ongoing
73	212, 238, 239	1.4m	15k	Very good	ATE	50%	Dissolved – IP left firm – no subsequent contact details - firm contacted - no response
74	239	298k	60k	strong	HMRC indemnity – only creditor in case	100%	Ongoing
75	212 and loan account overdrawn	58k	40k	good	none	As much as the court will allow	Dissolved – IP contacted - no response
76	212, 238, 239,423	298k	10k	good	ATE	100%	Dissolved – IP contacted - IP checking with regulatory body before responding
77	127	4k	2,500	60%	none	70 or 100 if go to trial	No record at Companies House – IP contacted – no response
78	Recovery of illegal dividends and other payments	Not stated	15k	65%	ATE	50%	Ongoing
79	Recovery of sale proceeds by m/ee with void mortgage	230k	25k	65%	ATE	80% HMRC largest creditor	Ongoing
80	212, unlawful payment, unlawful dividend, 423	249k	25k	75%	ATE	100%	Ongoing
81	Illegal dividends and payments	Not stated	10k	65%	ATE	50%	Ongoing

No.	Action (numbers refer to sections of the Insolvency Act 1986)	Value of action £	Likely Base Legal Costs excluding VAT and Disbursements	Chance of Success	ATE etc	CFA uplift %	Status of Liquidation as at 31/12/2013
82	Illegal dividends and 212	58k	10k	good	none	100%	Ongoing
83	Loan account overdrawn	100k	7,500 plus	good	none	100%	Ongoing
84	213, 238 and debt	up to 5m	100k	good	HMRC indemnity	100%	Ongoing
85	212, 238, 239	up to 1.2m	20k	unknown	ATE if needed	50%	Ongoing
86	127	68,435	7,500	good	ATE if needed	100%	Ongoing
87	Debt	55,250	7,500	good	ATE if needed	50%	Ongoing
88	212	84,845	7,500 plus	good	none	100%	Ongoing
89	212, 239	40k	4k or 20k if trial plus	good	ATE	0% HMRC main creditor – may receive something	Dissolved – IP contacted - the CFA never got going. Liquidator was holding 18,000 of the director's money and then, following his bankruptcy, settled with the OR and kept the money in lieu of litigation. No dividend to creditors.
90	212, 213	unclear on value but states should cover costs e.g. 40k?	5k to 25k	strong	ATE	75%	Ongoing
91	212	46,684	20k	good	ATE	60%	Ongoing
92	212, 213, 238	3m	300k sols 175k counsel	70%	HMRC or ATE	50% HMRC main creditor	Ongoing
93	212, 213, 423 and 320 CA 1985	441k	15k or 50k if defended	Counsel opinion	ATE	100% HMRC only creditor	Ongoing – legal fees up to July 2013 up to 129k – liquidator's fee to July 2013 83k –value of estate 1,463 - trial set for 2014 – settled October 2013 – sols and counsel took only 10% uplift to allow a dividend to HMRC of 114k – 26% of 450k debt. If lawyers had taken full uplift no dividend to creditors at all.
94	212 and unlawful dividends	52,420	7,500	good	none	100%	Ongoing

No.	Action (numbers refer to sections of the Insolvency Act 1986)	Value of action £	Likely Base Legal Costs excluding VAT and Disbursements	Chance of Success	ATE etc	CFA uplift %	Status of Liquidation as at 31/12/2013
95	Loan account overdrawn	150,611	10k	65%	ATE if needed	50%	Ongoing
96	Debt	29,581	4,860	good	ATE 4k deferred	60%	Ongoing

71 ongoing (one virtually complete - number 93)

11 dissolved where IP yet to respond

14 dissolved with IP response or where IP has filed a Final Receipts and Payments Account

Appendix 4

Financial impact on insolvency litigation claims pursued by insolvency act office holders by reference to proposed reforms to civil litigation funding and costs

Worked Examples

5th April 2011

Prepared by Nick Oliver (formerly of Howes Percival LLP and now with Verisona solicitors & advocates) with assistance from Michael Kain, Kain Knight Costs Draftsmen

The characteristics of the typical claim used for the examples

The examples below take one typical claim with the following characteristics:

- Wrongdoing by company officers
- No funds/assets available in the estate
- No creditor(s) having the ability to fund legal action
- Claim by Insolvency Practitioner as office holder pursuant to the Insolvency Act 1986 (liquidator) against 2 defendants for wrongful trading and misfeasance pursuant to sections 212 and 214 Insolvency Act 1986
- Value of claim is £1,400,000
- Solicitors and counsel act on a CFA with 50% uplift
- Claimant takes out ATE insurance (with staged premiums) to cover £500,000 of adverse costs (£250,000 per defendant) (except scenario 3 below where he/she benefits from 'Qualified One Way Costs Shifting'*)
- VAT can be recovered by the estate

The scenarios considered

For the purposes of considering the impact of the proposed reforms on this claim and, consequently, the estate and its creditors, the following scenarios have been considered:

Scenario 1 – The current regime (CFA success fees and ATE insurance premiums are recovered from the defendants)

Scenario 2 – The current regime is changed so that CFA success fees and ATE insurance premiums are no longer recoverable from the defendants

Scenario 3 - The current regime is changed so that (a) CFA success fees and ATE insurance premiums are no longer recoverable from the defendants; but (b) 'Qualified One Way Costs Shifting'* is brought in to benefit Insolvency Practitioner claimants holding office under the Insolvency Act 1986

The stages considered

The financial impact of success in the different scenarios is considered at the following 4 stages:

Stage 1 - Settlement pre issue – 'Global' settlement (including 50% of the recoverable legal costs)

Stage 2 - Settlement post issue (after 12 months) with costs paid by the defendants*

Stage 3 - Settlement post issue (after 12 months) – 'Global' settlement (including 50% of the recoverable legal costs)

Stage 4 - Win at Trial (18 months after issue) with costs paid by the defendants*

* - For the purposes of the example it has been assumed that all legal costs of the claim (excluding certain investigation costs) are recovered from the defendants where settlement is not on a 'Global' settlement basis.

Scenario 1 – The current regime (CFA success fees and ATE insurance premiums are recovered from the defendants)

Stage 1 – Settlement pre issue – 'Global' settlement (including costs)								
	Value of Claim (£)	Amount of Settlement / Judgment (£)	WIP (Not recoverable from Defendant as litigation costs) (£)	Disb'ments (Not recoverable from Defendant as litigation costs) (£)	Recoverable from Defendants (50% only where part of 'Global' settlement)			Total available to estate (£)
					WIP (Recoverable from Defendant as litigation costs) (£)	Disb'ments (Recoverable from Defendant as litigation costs) (£)	CFA Success Fee (@ 50% of WIP) (£)	
Value of Claim	1,400,000							
Settlement/Judgment		1,000,000						1,000,000
Pre issue work								
IP's WIP (investigation)			50,000					-50,000
IP's WIP (administration)			20,000					-20,000
Solicitors costs – WIP			40,000		40,000			-60,000
Solicitors costs – CFA Success Fee			20,000				20,000	-30,000
Counsel's fees - WIP			5,000		15,000			-12,500
Counsel's fees – CFA Success Fee			2,500				7,500	-6,250
ATE premium (Stage 1)						25,000		-12,500
Disbursements				2,000		5,000		-4,500
Post issue work								
Solicitors costs - WIP								
Solicitors costs – CFA Success Fee								
Counsel's fees - WIP								
Counsel's fees – CFA Success Fee								
Disbursements								
IP work post issue								
ATE Premium (Stage 2)								
ATE Premium (Stage 3)								
ATE Premium (Stage 4)								
Experts Fees								
Net recovery for estate (and, therefore, creditors)								**804,250**

Scenario 1 – The current regime (CFA success fees and ATE insurance premiums are recovered from the defendants)

Stage 2 – Settlement post issue (after 12 months) with costs paid by the defendants								
	Value of Claim (£)	Amount of Settlement / Judgment (£)	WIP (Not recoverable from Defendant as litigation costs) (£)	Disb'ments (Not recoverable from Defendant as litigation costs) (£)	Recoverable from Defendants (50% only where part of 'Global' settlement)			Total available to estate (£)
					WIP (Recoverable from Defendant as litigation costs) (£)	Disb'ments (Recoverable from Defendant as litigation costs) (£)	CFA Success Fee (@ 50% of WIP) (£)	
Value of Claim	1,400,000							
Settlement/Judgment		1,000,000						1,000,000
Pre issue work								
IP's WIP (investigation)			50,000					-50,000
IP's WIP (administration)			20,000					-20,000
Solicitors costs – WIP			40,000		40,000			-40,000
Solicitors costs – CFA Success Fee			20,000				20,000	-20,000
Counsel's fees - WIP			5,000		15,000			-5,000
Counsel's fees – CFA Success Fee			2,500				7,500	-2,500
ATE premium (Stage 1)								
Disbursements				2,000		5,000		-2,000
Post issue work								
Solicitors costs - WIP			20,000		120,000			-20,000
Solicitors costs – CFA Success Fee			10,000				60,000	-10,000
Counsel's fees - WIP			10,000		40,000			-10,000
Counsel's fees – CFA Success Fee			5,000				20,000	-5,000
Disbursements						3,000		
IP work post issue			15,000					-15,000
ATE Premium (Stage 2)								
ATE Premium (Stage 3)						125,000		
ATE Premium (Stage 4)								
Experts Fees						20,000		
Net recovery for estate (and, therefore, creditors)								**800,500**

Scenario 1 – The current regime (CFA success fees and ATE insurance premiums are recovered from the defendants)

Stage 3 – Settlement post issue (after 12 months) – 'Global' settlement (including costs)								
	Value of Claim (£)	Amount of Settlement / Judgment (£)	WIP (Not recoverable from Defendant as litigation costs) (£)	Disb'ments (Not recoverable from Defendant as litigation costs) (£)	Recoverable from Defendants (50% only where part of 'Global' settlement)			Total available to estate (£)
					WIP (Recoverable from Defendant as litigation costs) (£)	Disb'ments (Recoverable from Defendant as litigation costs) (£)	CFA Success Fee (@ 50% of WIP) (£)	
Value of Claim	1,400,000							
Settlement/Judgment		1,000,000						1,000,000
Pre issue work								
IP's WIP (investigation)			50,000					-50,000
IP's WIP (administration)			20,000					-20,000
Solicitors costs – WIP			40,000		40,000			-60,000
Solicitors costs – CFA Success Fee			20,000				20,000	-30,000
Counsel's fees - WIP			5,000		15,000			-12,500
Counsel's fees – CFA Success Fee			2,500				7,500	-6,250
ATE Premium (Stage 1)								
Disbursements				2,000		5,000		-4,500
Post issue work								
Solicitors costs - WIP			20,000		120,000			-80,000
Solicitors costs – CFA Success Fee			10,000				60,000	-40,000
Counsel's fees - WIP			10,000		40,000			-30,000
Counsel's fees – CFA Success Fee			5,000				20,000	-15,000
Disbursements						3,000		-1,500
IP work post issue			15,000					-15,000
ATE Premium (Stage 2)								
ATE Premium (Stage 3)						125,000		-62,500
ATE Premium (Stage 4)								
Experts Fees						20,000		-10,000
Net recovery for estate (and, therefore, creditors)								**562,750**

Scenario 1 – The current regime (CFA success fees and ATE insurance premiums are recovered from the defendants)

Stage 4 – Win at Trial (18 months after issue)								
	Value of Claim (£)	Amount of Settlement / Judgment (£)	WIP (Not recoverable from Defendant as litigation costs) (£)	Disb'ments (Not recoverable from Defendant as litigation costs) (£)	Recoverable from Defendants (50% only where part of 'Global' settlement)			Total available to estate (£)
					WIP (Recoverable from Defendant as litigation costs) (£)	Disb'ments (Recoverable from Defendant as litigation costs) (£)	CFA Success Fee (@ 50% of WIP) (£)	
Value of Claim	1,400,000							
Settlement/Judgment		1,000,000						1,000,000
Pre issue work								
IP's WIP (investigation)			50,000					-50,000
IP's WIP (administration)			20,000					-20,000
Solicitors costs – WIP			40,000		40,000			-40,000
Solicitors costs – CFA Success Fee			20,000				20,000	-20,000
Counsel's fees - WIP			5,000		15,000			-5,000
Counsel's fees – CFA Success Fee			2,500				7,500	-2,500
ATE Premium (Stage 1)								
Disbursements				2,000		5,000		-2,000
Post issue work								
Solicitors costs - WIP			30,000		200,000			-30,000
Solicitors costs – CFA Success Fee			15,000				100,000	-15,000
Counsel's fees - WIP			15,000		80,000			-15,000
Counsel's fees – CFA Success Fee			7,500				40,000	-7,500
Disbursements						5,000		
IP work post issue			40,000					-40,000
ATE Premium (Stage 2)								
ATE Premium (Stage 3)								
ATE Premium (Stage 4)						210,000		
Experts Fees						50,000		
Net recovery for estate (and, therefore, creditors)								**753,000**

Scenario 2 – The current regime is changed so that CFA success fees and ATE insurance premiums are no longer recoverable from the defendants

Stage 1 – Settlement pre issue – 'Global' settlement (including costs)								
	Value of Claim (£)	Amount of Settlement / Judgment (£)	WIP (Not recoverable from Defendant as litigation costs) (£)	Disb'ments (Not recoverable from Defendant as litigation costs) (£)	Recoverable from Defendants (50% only where part of 'Global' settlement)			Total available to estate (£)
					WIP (Recoverable from Defendant as litigation costs) (£)	Disb'ments (Recoverable from Defendant as litigation costs) (£)	CFA Success Fee (@ 50% of WIP) (£)	
Value of Claim	1,400,000							
Settlement/Judgment		1,000,000						1,000,000
Pre issue work								
IP's WIP (investigation)			50,000					-50,000
IP's WIP (administration)			20,000					-20,000
Solicitors costs – WIP			40,000		40,000			-60,000
Solicitors costs – CFA Success Fee			20,000				20,000	-40,000
Counsel's fees - WIP			5,000		15,000			-12,500
Counsel's fees – CFA Success Fee			2,500				7,500	-10,000
ATE premium (Stage 1)				25,000				-25,000
Disbursements				2,000		5,000		-4,500
Post issue work								
Solicitors costs - WIP								
Solicitors costs – CFA Success Fee								
Counsel's fees - WIP								
Counsel's fees – CFA Success Fee								
Disbursements								
IP work post issue								
ATE Premium (Stage 2)								
ATE Premium (Stage 3)								
ATE Premium (Stage 4)								
Experts Fees								
Net recovery for estate (and, therefore, creditors)								**778,000**

Scenario 2 – The current regime is changed so that CFA success fees and ATE insurance premiums are no longer recoverable from the defendants

Stage 2 – Settlement post issue (after 12 months) with costs paid by the defendants								
	Value of Claim (£)	Amount of Settlement / Judgment (£)	WIP (Not recoverable from Defendant as litigation costs) (£)	Disb'ments (Not recoverable from Defendant as litigation costs) (£)	Recoverable from Defendants (50% only where part of 'Global' settlement)			Total available to estate (£)
					WIP (Recoverable from Defendant as litigation costs) (£)	Disb'ments (Recoverable from Defendant as litigation costs) (£)	CFA Success Fee (@ 50% of WIP) (£)	
Value of Claim	1,400,000							
Settlement/Judgment		1,000,000						1,000,000
Pre issue work								
IP's WIP (investigation)			50,000					-50,000
IP's WIP (administration)			20,000					-20,000
Solicitors costs – WIP			40,000		40,000			-40,000
Solicitors costs – CFA Success Fee			20,000				20,000	-40,000
Counsel's fees - WIP			5,000		15,000			-5,000
Counsel's fees – CFA Success Fee			2,500				7,500	-10,000
ATE premium (Stage 1)								
Disbursements				2,000		5,000		-2,000
Post issue work								
Solicitors costs - WIP			20,000		120,000			-20,000
Solicitors costs – CFA Success Fee			10,000				60,000	-70,000
Counsel's fees - WIP			10,000		40,000			-10,000
Counsel's fees – CFA Success Fee			5,000				20,000	-25,000
Disbursements						3,000		
IP work post issue			15,000					-15,000
ATE Premium (Stage 2)								
ATE Premium (Stage 3)				125,000				-125,000
ATE Premium (Stage 4)								
Experts Fees						20,000		
Net recovery for estate (and, therefore, creditors)								**568,000**

Scenario 2 – The current regime is changed so that CFA success fees and ATE insurance premiums are no longer recoverable from the defendants

Stage 3 – Settlement post issue (after 12 months) – 'Global' settlement (including costs)								
	Value of Claim (£)	Amount of Settlement / Judgment (£)	WIP (Not recoverable from Defendant as litigation costs) (£)	Disb'ments (Not recoverable from Defendant as litigation costs) (£)	Recoverable from Defendants (50% only where part of 'Global' settlement)			Total available to estate (£)
					WIP (Recoverable from Defendant as litigation costs) (£)	Disb'ments (Recoverable from Defendant as litigation costs) (£)	CFA Success Fee (@ 50% of WIP) (£)	
Value of Claim	1,400,000							
Settlement/Judgment		1,000,000						1,000,000
Pre issue work								
IP's WIP (investigation)			50,000					-50,000
IP's WIP (administration)			20,000					-20,000
Solicitors costs – WIP			40,000		40,000			-60,000
Solicitors costs – CFA Success Fee			20,000				20,000	-40,000
Counsel's fees - WIP			5,000		15,000			-12,500
Counsel's fees – CFA Success Fee			2,500				7,500	-10,000
ATE Premium (Stage 1)								
Disbursements				2,000		5,000		-4,500
Post issue work								
Solicitors costs - WIP			20,000		120,000			-80,000
Solicitors costs – CFA Success Fee			10,000				60,000	-70,000
Counsel's fees - WIP			10,000		40,000			-30,000
Counsel's fees – CFA Success Fee			5,000				20,000	-25,000
Disbursements						3,000		-1,500
IP work post issue			15,000					-15,000
ATE Premium (Stage 2)								
ATE Premium (Stage 3)				125,000				-125,000
ATE Premium (Stage 4)								
Experts Fees						20,000		-10,000
Net recovery for estate (and, therefore, creditors)								**446,500**

Scenario 2 – The current regime is changed so that CFA success fees and ATE insurance premiums are no longer recoverable from the defendants

Stage 4 – Win at Trial (18 months after issue)								
	Value of Claim (£)	Amount of Settlement / Judgment (£)	WIP (Not recoverable from Defendant as litigation costs) (£)	Disb'ments (Not recoverable from Defendant as litigation costs) (£)	Recoverable from Defendants (50% only where part of 'Global' settlement)			Total available to estate (£)
					WIP (Recoverable from Defendant as litigation costs) (£)	Disb'ments (Recoverable from Defendant as litigation costs) (£)	CFA Success Fee (@ 50% of WIP) (£)	
Value of Claim	1,400,000							
Settlement/Judgment		1,000,000						1,000,000
Pre issue work								
IP's WIP (investigation)			50,000					-50,000
IP's WIP (administration)			20,000					-20,000
Solicitors costs – WIP			40,000		40,000			-40,000
Solicitors costs – CFA Success Fee			20,000				20,000	-40,000
Counsel's fees - WIP			5,000		15,000			-5,000
Counsel's fees – CFA Success Fee			2,500				7,500	-10,000
ATE Premium (Stage 1)								
Disbursements				2,000		5,000		-2,000
Post issue work								
Solicitors costs - WIP			30,000		200,000			-30,000
Solicitors costs – CFA Success Fee			15,000				100,000	-115,000
Counsel's fees - WIP			15,000		80,000			-15,000
Counsel's fees – CFA Success Fee			7,500				40,000	-47,500
Disbursements						5,000		
IP work post issue			40,000					-40,000
ATE Premium (Stage 2)								
ATE Premium (Stage 3)								
ATE Premium (Stage 4)				210,000				-210,000
Experts Fees						50,000		
Net recovery for estate (and, therefore, creditors)								**375,500**

Scenario 3 – **The current regime is changed so that (a) CFA success fees and ATE insurance premiums are no longer recoverable from the defendants; but (b) 'Qualified One Way Costs Shifting'* is brought in to benefit Insolvency Practitioner claimants holding office under the Insolvency Act 1986**

Stage 1 – Settlement pre issue – 'Global' settlement (including costs)								
	Value of Claim (£)	**Amount of Settlement / Judgment (£)**	**WIP (Not recoverable from Defendant as litigation costs) (£)**	**Disb'ments (Not recoverable from Defendant as litigation costs) (£)**	**Recoverable from Defendants (50% only where part of 'Global' settlement)**			**Total available to estate (£)**
					WIP (Recoverable from Defendant as litigation costs) (£)	**Disb'ments (Recoverable from Defendant as litigation costs) (£)**	**CFA Success Fee (@ 50% of WIP) (£)**	
Value of Claim	1,400,000							
Settlement/Judgment		1,000,000						1,000,000
Pre issue work								
IP's WIP (investigation)			50,000					-50,000
IP's WIP (administration)			20,000					-20,000
Solicitors costs – WIP			40,000		40,000			-60,000
Solicitors costs – CFA Success Fee			20,000				20,000	-40,000
Counsel's fees - WIP			5,000		15,000			-12,500
Counsel's fees – CFA Success Fee			2,500				7,500	-10,000
ATE premium (Stage 1)								
Disbursements				2,000		5,000		-4,500
Post issue work								
Solicitors costs - WIP								
Solicitors costs – CFA Success Fee								
Counsel's fees - WIP								
Counsel's fees – CFA Success Fee								
Disbursements								
IP work post issue								
ATE Premium (Stage 2)								
ATE Premium (Stage 3)								
ATE Premium (Stage 4)								
Experts Fees								
Net recovery for estate (and, therefore, creditors)								**803,000**

Scenario 3 – The current regime is changed so that (a) CFA success fees and ATE insurance premiums are no longer recoverable from the defendants; but (b) 'Qualified One Way Costs Shifting'* is brought in to benefit Insolvency Practitioner claimants holding office under the Insolvency Act 1986

Stage 2 – Settlement post issue (after 12 months) with costs paid by the defendants								
	Value of Claim (£)	**Amount of Settlement / Judgment (£)**	**WIP (Not recoverable from Defendant as litigation costs) (£)**	**Disb'ments (Not recoverable from Defendant as litigation costs) (£)**	**Recoverable from Defendants (50% only where part of 'Global' settlement)**			**Total available to estate (£)**
					WIP (Recoverable from Defendant as litigation costs) (£)	**Disb'ments (Recoverable from Defendant as litigation costs) (£)**	**CFA Success Fee (@ 50% of WIP) (£)**	
Value of Claim	1,400,000							
Settlement/Judgment		1,000,000						1,000,000
Pre issue work								
IP's WIP (investigation)			50,000					-50,000
IP's WIP (administration)			20,000					-20,000
Solicitors costs – WIP			40,000		40,000			-40,000
Solicitors costs – CFA Success Fee			20,000				20,000	-40,000
Counsel's fees - WIP			5,000		15,000			-5,000
Counsel's fees – CFA Success Fee			2,500				7,500	-10,000
ATE premium (Stage 1)								
Disbursements				2,000		5,000		-2,000
Post issue work								
Solicitors costs - WIP			20,000		120,000			-20,000
Solicitors costs – CFA Success Fee			10,000				60,000	-70,000
Counsel's fees - WIP			10,000		40,000			-10,000
Counsel's fees – CFA Success Fee			5,000				20,000	-25,000
Disbursements						3,000		
IP work post issue			15,000					-15,000
ATE Premium (Stage 2)								
ATE Premium (Stage 3)								
ATE Premium (Stage 4)								
Experts Fees						20,000		
Net recovery for estate (and, therefore, creditors)								**693,000**

Scenario 3 – The current regime is changed so that (a) CFA success fees and ATE insurance premiums are no longer recoverable from the defendants; but (b) 'Qualified One Way Costs Shifting'* is brought in to benefit Insolvency Practitioner claimants holding office under the Insolvency Act 1986

Stage 3 – Settlement post issue (after 12 months) – 'Global' settlement (including costs)								
	Value of Claim (£)	Amount of Settlement / Judgment (£)	WIP (Not recoverable from Defendant as litigation costs) (£)	Disb'ments (Not recoverable from Defendant as litigation costs) (£)	Recoverable from Defendants (50% only where part of 'Global' settlement)			Total available to estate (£)
					WIP (Recoverable from Defendant as litigation costs) (£)	Disb'ments (Recoverable from Defendant as litigation costs) (£)	CFA Success Fee (@ 50% of WIP) (£)	
Value of Claim	1,400,000							
Settlement/Judgment		1,000,000						1,000,000
Pre issue work								
IP's WIP (investigation)			50,000					-50,000
IP's WIP (administration)			20,000					-20,000
Solicitors costs – WIP			40,000		40,000			-60,000
Solicitors costs – CFA Success Fee			20,000				20,000	-40,000
Counsel's fees - WIP			5,000		15,000			-12,500
Counsel's fees – CFA Success Fee			2,500				7,500	-10,000
ATE Premium (Stage 1)								
Disbursements				2,000		5,000		-4,500
Post issue work								
Solicitors costs - WIP			20,000		120,000			-80,000
Solicitors costs – CFA Success Fee			10,000				60,000	-70,000
Counsel's fees - WIP			10,000		40,000			-30,000
Counsel's fees – CFA Success Fee			5,000				20,000	-25,000
Disbursements						3,000		-1,500
IP work post issue			15,000					-15,000
ATE Premium (Stage 2)								
ATE Premium (Stage 3)								
ATE Premium (Stage 4)								
Experts Fees						20,000		-10,000
Net recovery for estate (and, therefore, creditors)								**571,500**

Scenario 3 – The current regime is changed so that (a) CFA success fees and ATE insurance premiums are no longer recoverable from the defendants; but (b) 'Qualified One Way Costs Shifting'* is brought in to benefit Insolvency Practitioner claimants holding office under the Insolvency Act 1986

Stage 4 – Win at Trial (18 months after issue)								
	Value of Claim (£)	Amount of Settlement / Judgment (£)	WIP (Not recoverable from Defendant as litigation costs) (£)	Disb'ments (Not recoverable from Defendant as litigation costs) (£)	Recoverable from Defendants (50% only where part of 'Global' settlement)			Total available to estate (£)
					WIP (Recoverable from Defendant as litigation costs) (£)	Disb'ments (Recoverable from Defendant as litigation costs) (£)	CFA Success Fee (@ 50% of WIP) (£)	
Value of Claim	1,400,000							
Settlement/Judgment		1,000,000						1,000,000
Pre issue work								
IP's WIP (investigation)			50,000					-50,000
IP's WIP (administration)			20,000					-20,000
Solicitors costs – WIP			40,000		40,000			-40,000
Solicitors costs – CFA Success Fee			20,000				20,000	-40,000
Counsel's fees - WIP			5,000		15,000			-5,000
Counsel's fees – CFA Success Fee			2,500				7,500	-10,000
ATE Premium (Stage 1)								
Disbursements				2,000		5,000		-2,000
Post issue work								
Solicitors costs - WIP			30,000		200,000			-30,000
Solicitors costs – CFA Success Fee			15,000				100,000	-115,000
Counsel's fees - WIP			15,000		80,000			-15,000
Counsel's fees – CFA Success Fee			7,500				40,000	-47,500
Disbursements						5,000		
IP work post issue			40,000					-40,000
ATE Premium (Stage 2)								
ATE Premium (Stage 3)								
ATE Premium (Stage 4)								
Experts Fees						50,000		
Net recovery for estate (and, therefore, creditors)								**585,500**

COMPARISON TABLE – OUTCOMES FOR THE INSOLVENT ESTATE

Stage	Description	Net recovery for estate (£)		
		Scenario 1 (Current regime)	**Scenario 2** (No recoverability of CFA success fees or ATE)	**Scenario 3** (QOWCS*)
1	Settlement pre issue – 'Global' settlement (including costs)	804,250	778,000	803,000
2	Settlement post issue (after 12 months) with costs paid by the defendants	800,500	568,000	693,000
3	Settlement post issue (after 12 months) – 'Global' settlement (including costs)	562,750	446,500	571,500
4	Win at Trial (18 months after issue)	753,000	375,500	585,500

Key

* - Scenario 3 assumes that 'Qualified One Way Costs Shifting' is introduced with complete certainty regarding the office holders exemption from adverse costs – e.g. that there is no residual danger of an adverse costs order by failing to beat a Part 36 offer. If 'Qualified One Way Costs Shifting' is introduced without such certainty, the office holder would still be required to take out ATE insurance and the considerable benefit to the estate would be lost. In such circumstances, the outcomes for the estate would be broadly in line with Scenario 2.

ATE - 'After The Event' Insurance
- Stage 1 – Pre issue (Premium = 5% of cover required)
- Stage 2 – Post issue - but prior to first hearing (Premium = 19% of cover required)
- Stage 3 – Post issue - after first hearing but more than 14 days prior to trial (Premium = 25% of cover required)
- Stage 4 – Post issue - less than 14 days from trial (Premium = 42% of cover required)

CFA - Conditional Fee Agreement
IP - Insolvency Practitioner
QOWCS - 'Qualified One Way Costs Shifting'
WIP - Work in progress (on time cost basis)